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No.

In the Supreme Court of the United States

WORLDWIDE BASKETBALL AND SPORT TOURS, INC., et al.,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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APRIL 14, 2005

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QUESTIONS PRESENTED

1. Whether, under Section One of the Sherman Act, 15 U.S.C. § 1, proof of significant anticompetitive effects renders a formal market analysis unnecessary only in "quick look" rule of reason cases?

2. Whether, under Section One of the Sherman Act, 15 U.S.C. § 1, an appellate court may reverse a finding of a violation based upon lack of proof of a relevant market, where a relevant market was agreed to by the parties and their experts, and adopted by the district court?

PARTIES TO THE PROCEEDINGS BELOW AND STATEMENT REQUIRED BY RULE 29.6

In addition to the parties named in the caption, the following parties were plaintiffs in the proceedings below and are petitioners in this action: The Gazelle Group, Inc.; Sport Tours International; and Sports Promotions.

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state the following:

Worldwide Basketball and Sport Tours, Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

The Gazelle Group, Inc. has no parent company, and no publicly owned company owns 10% or more of its stock.

Sport Tours International has no parent company, and no publicly owned company owns 10% or more of its stock.

Sports Promotions has no parent company, and no publicly owned company owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Worldwide Basketball and Sport Tours, Inc., The Gazelle Group, Inc., Sport Tours International, and Sports Promotions respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The court of appeals' order denying the petition for rehearing *en banc* is published at 2005 U.S. App. LEXIS 1753, and appears in the Appendix of this Petition ("App.") at 1a-2a. The opinion of the court of appeals is published at 388 F.3d 955 and appears at App. 3a-23a. The district court's memorandum opinion granting partial summary judgment on behalf of Petitioners is published at 273 F. Supp. 2nd 933 and appears at App. 24a-66a. The district court's earlier memorandum opinion holding partial summary judgment in abeyance is unpublished and appears at App. 67a-105a.

JURISDICTION

The court of appeals entered judgment on November 15, 2004, and denied a timely petition for rehearing on January 18, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF STATUTORY AND OTHER FEDERAL LAW

The relevant statutory provision is Section 1 of the Sherman Act, 15 U.S.C. § 1, which provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint or trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

Despite the broad language of the Sherman Act, this Court has held that it prohibits only "unreasonable restraints of trade." *NCAA v. Board of Regents*, 468 U.S. 85, 98 (1984).

STATEMENT OF THE CASE

This case presents two important questions of federal antitrust law that have divided the lower courts. First, the Sixth Circuit, in conflict with precedents of other courts of appeals and of this Court, ruled that the use of significant anticompetitive effects in lieu of a more formal market analysis as proof of market power is limited to "quick look" rule of reason cases. The Court should correct this fundamental misunderstanding of the "quick look" approach and of basic approaches to the determination of market power in antitrust cases. Second, the Sixth Circuit, again in conflict with precedents of other courts of appeals and of this Court, reversed without remand for failure to prove a relevant market when a relevant market was agreed to by the parties, their experts, and the District Court. If allowed to stand, the decision will destroy settled expectations and eviscerate the judicial economy that results from the common practice of stipulations and agreements regarding contested facts such as market definition.

Factual Background

The petitioners, plaintiffs below, are sports promoters who during the relevant time period promoted tournament-type events involving Division I men's college basketball.

(App. at 27a, 68a). The petitioners challenge under the antitrust laws the Two in Four Rule, an NCAA regulation restricting participation by NCAA member institutions in certified basketball tournaments to twice in any four year period, beginning with the 2000-01 season. (App. at 25a).

The petitioners contend that the Two in Four Rule has the intent and effect of driving petitioners and other outside promoters of Division I college basketball certified tournaments out of business, causing an overall reduction of output and denial of consumer preference in Division I men's college basketball. The genesis of the rule, as stated by the NCAA, was a "concern" about the "proliferation" of certified events, and a belief that "funds from the events should accrue more to institutions than to outside promoters." (App. at 100a).

The District Court held two bench trials, one in 2002 and one in 2003. During the two proceedings, it received into evidence live and deposition testimony from over forty witnesses, as well as hundreds of documentary exhibits, focusing on the history of the Two in Four Rule and its effect on output, competition and competitors. The parties, their experts and the court agreed that a relevant market for antitrust purposes is Division I men's college basketball. (App. at 14a, 22a, 38a, 43a, 47a, 54-55a, 59a, 86a). The District Court found, following the 2003 trial, that the Two in Four Rule has an adverse effect on competition - reducing output and denying consumers the ability to view highly popular certified tournaments. (App. at 57a, 60-62a). The District Court found that the NCAA purported procompetitive justifications – an alleged concern for student welfare, and a desire to give lesser-known schools more opportunities to play in desirable tournaments – were not credible. (App. at 26-27a, 63a-65a). On July 28, 2003, based upon these findings,

the District Court granted a permanent injunction under § 16 of the Clayton Act, 15 U.S.C. § 26.

Decision of the Court of Appeals

A divided panel of the Sixth Circuit reversed. The majority opinion held that the District Court, despite stating that it was applying a full rule of reason approach, actually had applied a "quick-look" analysis. (App. at 11-12a). The majority based its opinion upon the District Court's statement that proof of significant anticompetitive effects may eliminate the need for formal market analysis in determining market power. *Id.* The majority opinion equated this with a "quick-look" analysis, and found such an analysis to be in error. *Id.*

The majority opinion next turned to a full rule of reason analysis, which it asserted requires a detailed market definition. The opinion observed that "The district court found the relevant market in this case to be Division I mens' college basketball, and noted that both the Promoters and the NCAA agreed with this definition of the relevant market." (App. at 14a). Despite this finding of a relevant market by the district court, which was expressly based upon the agreement of the parties and their experts, the majority opinion held that the Promoters failed to define a relevant market and the record was insufficient to support a holding regarding a relevant market. (App. at 14a-17a) On that basis the majority opinion reversed, without remand, the judgment of the District Court. (App. at 18a).

REASONS FOR GRANTING THE PETITION

Review by this Court of the decision of the Sixth Circuit is necessary to ensure the proper and uniform resolution of two important questions regarding antitrust liability. First,

may plaintiffs use proof of significant anticompetitive effects as proof of market power in any antitrust case, or is such proof limited to "quick-look" rule of reason cases? Second, may parties agree upon a relevant market definition, an issue of fact, or may a relevant market agreed to by the parties, their expert, and the District Court be disregarded by an appellate court?

If left unreviewed, the conflicts between the Sixth Circuit decision and the decisions of other circuits and this Court will wreak havoc with antitrust practice. The Court should grant certiorari to resolve these conflicts among the circuits and reject the Sixth Circuit's position on each question.

I. The Sixth Circuit Decision Is In Conflict With Other Circuits In Holding That The Use Of Significant Anticompetitive Effects In Lieu Of Formal Market Analysis To Prove Market Power Is Limited To "Quick-Look" Rule Of Reason Cases Under The Sherman Act.

The Sixth Circuit majority opinion holds that the District Court erred in applying a "quick-look" rule of reason approach. The Sixth Circuit, however, is in direct conflict with the Second Circuit and with opinions of this Court. It is imperative that this Court clarify the distinction between the "quick-look" approach and general rules for determining market power.

In both its 2002 and 2003 decisions, the District Court stated that it was applying a full rule of reason approach rather than a "quick-look" approach. (App. at 52a-53a, 81a). In addition, however, the District Court noted in its 2003 decision that "if a Plaintiff can show that the restraint has produced significant anti-competitive effects, such as a

reduction in output, a formal market analysis is unnecessary." (App. at 56a). The Sixth Circuit majority opinion cited this comment and stated: "This is, in fact, an able exposition of the quick-look standard." (App. at 11a). The Sixth Circuit reversed without remand, the majority opinion holding that the District Court was applying a quick-look analysis and erred in doing so. (App. at 12a).

The majority opinion directly conflicts with the Second Circuit and this Court. The Second Circuit has stated:

> Defendants mistake this approach for the "quick look" or "truncated" rule of reason inquiry that the Supreme Court has endorsed in certain contexts. . . . The use of anticompetitive effects to demonstrate market power, however, is not limited to "quick look" or "truncated" rule of reason cases. [citations omitted].

Todd v. Exxon Corp., 275 F.3d 191, 206-07 (2nd Cir. 2001). As the Second Circuit points out, the use of anticompetitive effects is not coextensive with, or limited to, "quick-look" cases – it is a mode of market power analysis that applies to any rule of reason case, to monopoly cases, and indeed to any case where market power is at issue. *See, e.g., Pepsico, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 107 (2nd Cir. 2002) (Section 2 monopoly claim); *Great W. Directories v. Southwestern Bell Tel. Co.*, 63 F.3d 1378, 1384 (5th Cir. 1995) (Section 2 monopoly claim); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000) (Section 5 of the Federal Trade Commission Act).

Even under the full rule of reason, "proof of actual detrimental effects, such as reduction in output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects." *FTC v. Indiana Federation*

of Dentists, 476 U.S. 447, 460-61 (1986). The primary difference between the full rule of reason and quick-look standard is that under the quick-look standard a plaintiff can meet its burden by showing a restraint where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anti-competitive effect on customers and markets." *California Dental Association v. Federal Trade Commission*, 526 U.S. 756 (1999) (emphasis added). Thus the quick-look standard differs from a "full blown" rule of reason approach primarily by permitting a plaintiff to meet its burden by showing potential, rather than actual, anticompetitive effects.

The conflict among the circuits, and the confusion relating to the "quick-look" rule of reason standard, must be clarified by this Court.

II. The Sixth Circuit Decision Is In Conflict With Other Circuits In Ignoring A Relevant Market Agreed To By The Parties And Their Experts, And Adopted By The District Court, In A Rule Of Reason Case Under The Sherman Act.

At the 2002 trial, the parties agreed that the relevant market was Division I men's college basketball, as confirmed by the District Court. (App. at 43a, 86a). At the 2003 trial, experts for both sides again opined that the relevant market was Division I men's college basketball, and the District Court adopted that relevant market. (App. at 38a, 43a, 47a, 54-55a, 59a). The Sixth Circuit majority opinion notes that this relevant market was undisputed. (App. at 14a). And the Sixth Circuit concurring opinion specifically states: "As both parties agree, the relevant market is the market for college basketball games." (App. at 22a).

Despite universal agreement during the district court proceedings that Division I men's college basketball was a relevant market, the Sixth Circuit majority opinion ruled that petitioners failed to meet their burden of proving a relevant market, and reversed without remand.

The Sixth Circuit's disregard of an agreed relevant market is contrary to decisions of other circuits and of this Court. There are a substantial number of antitrust cases where parties stipulated or agreed to a relevant market which was then adopted by the court. *See, e.g., United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973) (stipulated relevant market); *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964) (parties agree on relevant market, eliminating a "troublesome question" often found in antitrust cases); *LePage's, Inc. v. 3M*, 324 F.3d 141 (3rd Cir. 2004) (agreement on relevant product market); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999) (agreement on relevant product market); *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90 (2nd Cir. 1998) (stipulated relevant market); *General Industries Corp. v. Hartz Mountain Corp.*, 810 F.2d 795 (8th Cir. 1987) (agreement on relevant geographic market); *Indian Coffee Corp. v. Procter & Gamble Co.*, 752 F.2d 891 (3rd Cir. 1984) (stipulated relevant market); *Aquachem Co. v. Olin Corp.*, 699 F.2d 516 (11th Cir. 1983) (agreed geographic market); *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785 (2nd Cir. 1983) (stipulated product market); *Lansdale v. Philadelphia Electric Co.*, 692 F.2d 307 (3rd Cir. 1982) (stipulated product market); *Northeastern Tel. Co. v. Am. Tel. & Tel. Co.*, 651 F.2d 76 (2nd Cir. 1981) (stipulated relevant market); *Columbia Broadcasting System, Inc. v. American Soc. of Composers*, 620 F.2d 930 (2nd Cir. 1980) (agreement on relevant market).

Plaintiffs, despite their efforts, failed to find any case where an appellate court disregarded or reversed a stipulated or agreed upon relevant market. Indeed, in one case where a dissent's analysis attempted to stray from an agreement on the relevant market, the majority chided the dissent, stating in part: "It is also dangerous for it may have the effect of both dissuading litigants from agreeing upon facts and deterring agencies from acting on the agreed stipulations of facts . . . Having agreed on a set of facts, the parties, and this Court, must be bound by them; we are not free to pick and choose at will." *Stanley Works v. FTC*, 469 F.2d 498, 506 (2nd Cir. 1972).

The benefit of an agreement regarding market definition is apparent – market definition issues can be time-consuming and expensive, and agreements or stipulations result in a saving of resources for both the parties and the court. The Sixth Circuit decision's disregard of the agreed upon relevant market of Division I men's college basketball was contrary to precedent of this Court, and of every court in the land that Plaintiff could find where this issue was considered. It is of exceptional importance that this conflict be swiftly eliminated, and the ability to stipulate or agree to market definitions be expressly confirmed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 14, 2005

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-4024

[Filed January 18, 2005]

Worldwide Basketball and Sport Tours, Inc., et al., Plaintiffs-Appellees,	)
v.	)
National Collegiate Athletic Association, Defendant-Appellant.	)

ORDER

BATCHELDER, GIBBONS, COOK, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-4024

[Filed November 15, 2004]

Worldwide Basketball and Sport Tours, Inc., et al., Plaintiffs-Appellees,	)
v.	)
National Collegiate Athletic Association, Defendant-Appellant.	)

OPINION

BATCHELDER, Circuit Judge.

The National Collegiate Athletic Association, (the "NCAA"), appeals the district court's order declaring that the NCAA's "Two in Four Rule" violates Section I of the Sherman Antitrust Act, 15 U.S.C. § 1, and permanently enjoining the enforcement of that rule. Because we conclude that the district court erred in applying an abbreviated or "quick-look" analysis and in its definition of the market for

purposes of antitrust analysis, and because the record does not contain evidence to support a proper market definition, we REVERSE the judgment of the district court.

I.

The NCAA is a voluntary organization of over 1200 colleges and universities that promulgates rules and regulations designed to, in its own words, "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body." To accomplish this goal, the NCAA adopts bylaws formulated by a legislative body drawn from the Association's membership. The NCAA members agree to follow those by-laws. Of concern in this case is a portion of the NCAA Division I men's basketball regulations, specifically because of a restriction on the type and number of games individual schools are permitted to play.

Men's Division I basketball is divided into conferences; within each conference the member schools individually play each other. Each school, however, makes its own schedule and may seek several non-conference games. The NCAA sets the maximum number of games that each team may play per year. Throughout the year, there are various tournaments in which a school's team may participate, some of which are "certified" and some of which are not. Certified tournament events are multiple-game early season tournaments. These events were originally introduced as a means of encouraging scheduled games with schools in Alaska and Hawaii that traditionally had difficulty scheduling games because of their inconvenient locations. In recent years, the NCAA has become concerned that the more "powerful" basketball schools (i.e., members of the "Big Six" conferences) were disproportionately taking advantage of the certified events. To

address this concern, the NCAA adopted Proposal 98- 92 ("98-92"), which increases to 28 the number of allowed games per season for each team, provides that a team's participation in a certified event, regardless of how many games the team actually plays as part of that event, counts as one game toward the NCAA regular season maximum, and permits each team to participate in "not more than one certified basketball event in one academic year, and not more than two certified basketball events every four years." As stated in the text of 98-92, the rationale of the rule is to:

> address competitive equity concerns by giving many Division I institutions an opportunity to compete in certified events, particularly those outside the continental United States, so that the inherent recruiting and competitive advantages are distributed equally among Division I institutions. This proposal will provide Division I men's and women's basketball programs greater flexibility in the scheduling of basketball contests. It will permit institutions the opportunity to participate in certified contests in accordance with the legislation or to add additional contests to the institution's regular-season schedules during those years in which the institution either is not permitted to engage in a certified contest or chooses not to participate in such an event.

The plaintiffs in this case are promoters of outside certified tournament events (the "Promoters"). They allege that the NCAA is less concerned with the disproportionate advantage to the Big Six Conferences than it is with the monies that the outside promoters of certified events are able to make in connection with these events. The Promoters contend that the Two in Four Rule, the prong of 98- 92 that limits teams to two certified events every four years, was

adopted purely to deny outside promoters the opportunity to make money from the certified events.

Complaining that the application of this rule limited their ability to schedule events with schools having the most powerful and famous basketball programs, which in turn hampered their ability to sell tickets and make broadcast contracts, the Promoters initiated this suit on December 21, 2000, alleging that the Two in Four rule is a violation of the Sherman Antitrust Act. On August 6, 2001, they filed a motion for preliminary injunction under § 16 of the Clayton Act; that motion was then consolidated with a motion for permanent injunction. The district court issued an Opinion and Order on July 19, 2002, holding that because the rule had not been in effect long enough to permit its effect to be accurately evaluated, the motion for preliminary injunction was denied and the motion for permanent injunction would be held in abeyance. The plaintiffs renewed their request for a permanent injunction on February 29, 2003, asserting that there was by then enough evidence to justify the injunction. The district court granted the permanent injunction on July 28, 2003. *Worldwide Basketball and Sports Tours, Inc. v. NCAA*, 273 F. Supp. 2d 933, 954-55 (S.D. Ohio 2003). The NCAA timely appealed, and because of the nature of the injunction, the NCAA sought and obtained from this court a stay and order for expedited appeal.

II.

Our standard of review for the granting or denial of a permanent injunction is mixed:

> When reviewing the decision of a district court to grant or to deny a request for issuance of a permanent injunction, we employ several different standards of

> review. Factual findings are reviewed under the clearly erroneous standard, legal conclusions are reviewed de novo, and the scope of injunctive relief is reviewed for an abuse of discretion.

Secretary of Labor, U.S. Dept. of Labor v. 3RE.COM, Inc., 317 F.3d 534, 537 (6th Cir. 2003) (citing *S. Cent. Power Co. v. Int'l Bhd. of Elec. Workers, Local Union 2359*, 186 F.3d 733, 737 (6th Cir. 1999) (internal quotations omitted)).

Section One of the Sherman Act provides that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 10,000,000 if a corporation, or, if any other person, $ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1. By its plain language, this section applies to the Two in Four rule only if the rule is commercial in nature. The NCAA maintains that the rule is academically directed and motivated and its commercial impact is negligible. The Promoters and the district court, on the other hand, assume that the Two in Four rule involves a "restraint of trade or commerce." *Id.*

The dispositive inquiry in this regard is whether the rule itself is commercial, not whether the entity promulgating the rule is commercial. *See, e.g., Virginia Vermiculite, Ltd. v.*

W.R. Grace & Co.-Connecticut, 156 F.3d 535, 540 (4th Cir. 1998). At least some NCAA rules have been held to be commercial and hence subject to antitrust scrutiny. *See National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 98, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984) ("*Bd. of Regents*") (finding NCAA rules limiting live broadcasting of college football games subject to scrutiny under Sherman Act). One of our sister circuits has held that NCAA rules governing eligibility for participating in collegiate sports are not commercial, *see Smith v. NCAA*, 139 F.3d 180, 184-85 (3rd Cir. 1998), *vacated on other grounds by NCAA v. Smith*, 525 U.S. 459, 142 L. Ed. 2d 929, 119 S. Ct. 924 (1999), but this circuit has not yet addressed the commercial or non-commercial nature of particular NCAA rules.

We think it apparent that the Two in Four rule has some commercial impact insofar as it regulates games that constitute sources of revenue for both the member schools and the Promoters. We therefore assume that the district court's implicit finding that the Two in Four rule is commercial is supported by the evidence and we proceed on that basis.

In order to establish their claim under Section 1 of the Sherman Act, the Promoters must prove that the NCAA "(1) participated in an agreement that (2) unreasonably restrained trade in the relevant market." *Nat'l Hockey League Players' Assoc. v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6th Cir. 2003). The NCAA does not dispute the Promoters' claim that the Two in Four Rule represents an agreement in which the NCAA participated. The NCAA vigorously contests the district court's conclusion that the Two in Four agreement unreasonably restrains trade in the relevant market.

A.

Whether an agreement unreasonably restrains trade is determined under one of two approaches: the per se rule and the rule of reason. It is well-established that cases involving industries "in which horizontal restraints on competition are essential if the product is to be available at all" should be analyzed using the rule of reason. *See Bd. of Regents*, 468 U.S. at 100-01; *see also Nat'l Hockey League*, 325 F.3d at 719 (finding that the district court erred in failing to apply the rule of reason analysis to a challenge concerning hockey league eligibility rules). Because there is no doubt that horizontal restraints are necessary to make the kind of league competition at issue available, the rule of reason applies.

Under the rule of reason analysis, the plaintiff bears the burden of establishing that the conduct complained of "produces significant anticompetitive effects within the relevant product and geographic markets." *Nat'l Hockey League*, 325 F.3d at 718. If the plaintiff is able to meet that burden, the defendant must provide evidence to establish that the restraint complained of has procompetitive effects sufficient to justify the injury resulting from the anticompetitive effects of the restraint. *Id.* The plaintiff is then left to prove that the legitimate procompetitive objectives can be achieved in a substantially less restrictive manner. *Id.*

This court has held that "the determination of a relevant market is composed of the articulation of a legal test which is then applied to the factual circumstances of each case." *White & White, Inc. v. Amer. Hosp. Supply Corp.*, 723 F.2d 495, 499 (6th Cir. 1983) (citations omitted) (emphasis in original). Accordingly, while a district court's conclusion concerning what constitutes the relevant market is subject to the clearly erroneous standard of review, "the district court's formulation

of the market tests may be freely reviewed on appeal as a matter of law[.]" *Id.* at 500.

When applying the rule of reason, the courts have occasionally applied what has come to be called an abbreviated or "quick-look" analysis. Accordingly, in analyzing a restriction on the number of NCAA football games which could be televised in *Bd. of Regents*, the Supreme Court held that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis." *Bd. of Regents*, 468 U.S. at 110. Similarly, in *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986), the Court found that "no elaborate industry analysis is required to demonstrate the anticompetitive character" of a horizontal agreement among dentists to withhold X-Rays from insurers for use in benefit determinations. *Id.* at 459 (quoting *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 692, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)). Recently, in *California Dental Assoc. v. FTC*, 526 U.S. 756, 143 L. Ed. 2d 935, 119 S. Ct. 1604 (1999), the Supreme Court granted certiorari to address when abbreviated or quick-look rule of reason is appropriate. *Id.* at 764-65. The Court reasoned that:

> there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a

> restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.

Id. at 780-81. In analyzing cases such as *Bd of Regents, Indiana Fed'n of Dentists, and Nat'l Soc. of Prof'l Eng'rs* in which an abbreviated or quick-look analysis was applied, the Court found that "in each of these cases . . . an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Id.* at 770.

In its 2002 decision denying a preliminary injunction, the district court found application of the quick-look rule of reason inappropriate, stating that "the two in four rule simply does not have the 'obvious anti-competitive effects' as the rule at issue in *Board of Regents* [did,] so as to dispense with the full rule of reason analysis." In its 2003 decision granting a preliminary injunction, the court again suggested that it was applying the full rule of reason analysis. *See Worldwide Basketball & Sports Tours*, 273 F. Supp. 2d at 948. After accurately announcing the requirements of the full rule of reason, however, the district court stated that "if a Plaintiff can show that the restraint has actually produced significant anti-competitive effects, such as a reduction in output, a formal market analysis is unnecessary." *Id.* at 949-50 (quoting *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839, 847-48 (9th Cir. 1996) (quoting *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991)) (internal quotation marks omitted)). This is, in fact, an able exposition of the quick-look standard. Indeed, the authority ultimately quoted by the district court-the Ninth Circuit's opinion in *Bhan*-itself relies upon *Indiana Fed'n of Dentists*, which the Supreme Court referred to as forming the basis for the abbreviated or quick-look analysis. *See Bhan*, 929 F.2d at 1413 (citing *Indiana Fed'n of Dentists*, 476 U.S. at 460-61); *see also California*

Dental Assoc., 526 U.S. at 770 (characterizing *Indiana Fed'n of Dentists* as forming the basis for "quick look").

We believe that the district court was correct the first time: this is not a case which is suitable for quick-look analysis. Far from being a case in which "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on *customers* and *markets*," *id.* (emphasis added), here the relevant market is not readily apparent and the Plaintiffs have failed to adequately define a relevant market, thereby making it impossible to assess the effect of 98-92 on customers rather than merely on competitors. While it is true that "the rule of reason can sometimes be applied in the twinkling of an eye," *Bd. of Regents*, 468 U.S. at 109 n.39 (quoting P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37-38 (Federal Judicial Center, June 1981) (parenthetical omitted)), this abbreviated or "quick-look" analysis may only be done where the contours of the market and, where relevant, submarket, are sufficiently well-known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition. Under the "quick-look" approach, extensive market and cross-elasticity analysis is not necessarily required, but where, as here, the precise product market is neither obvious nor undisputed, the failure to account for market alternatives and to analyze the dynamics of consumer choice simply will not suffice. The district court therefore erred in applying a quick-look analysis.

B.

"In considering what is the relevant market for determining the control of price and competition, no more

definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce', monopolization of which may be illegal." *United States v. E.I. du Pont De Nemours & Co.*, 351 U.S. 377, 395, 100 L. Ed. 1264, 76 S. Ct. 994 (1954). The "relevant market encompasses notions of geography as well as product use, quality, and description." *Nat'l Hockey League*, 325 F.3d at 719 (quoting *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (internal quotation marks omitted)). Relying on du Pont, this court has found the "reasonable interchangeability" standard to be the essential test for ascertaining the relevant product market test. *White & White*, Inc., 723 F.2d at 500. Reasonable interchangeability "may be gauged by (1) the product uses, i.e., whether the substitute products or services can perform the same function, and/or (2) consumer response (cross-elasticity); that is, consumer sensitivity to price levels at which they elect substitutes for the defendant's product or service." *Id.* (citation omitted).

The Supreme Court has long recognized that within a product market, "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962) (citing *E. I. du Pont de Nemours & Co.*, 353 U.S. at 593-595, 1 L. Ed. 2d 1057, 77 S. Ct. 872). "The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.*

A submarket "merely provides several new factors, in addition to [the existing ones of] selling price, uses, and physical characteristics, which the court may use in determining interchangeability between different products." *White & White*, Inc., 723 F.2d at 500 (quotation, citation, and emphasis omitted). However, a submarket analysis incorporates, but does not replace, the standard market test. It merely adds new factors to that test so as to more precisely define the market affected by the defendant's actions." *Id.* The burden is on the antitrust plaintiff to define the relevant market within which the alleged anticompetitive effects of the defendant's actions occur. *See Tanaka*, 252 F.3d at 1063. "Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim." *Nat'l Hockey League*, 325 F.3d at 719-20 (quoting Tanaka, 252 F.3d at 1063 (citing *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1105 (9th Cir. 1999))).

The district court found the relevant market in this case to be Division I mens' college basketball, and noted that both the Promoters and the NCAA agreed with this definition of the relevant market. *Worldwide*, 273 F. Supp. 2d at 949. Although the NCAA does not appear to have disputed the Promoters' view that the relevant market is Division I Men's Basketball as a whole, the basis for that view is not developed in the record. Indeed, the district court had no factual circumstances to which it could apply the legal test, since the Promoters presented no evidence of "products or services that are either (1) identical to or (2) available substitutes for the defendant's product or service." *White and White*, 723 F.2d at 500. Dr. Tollison, the Promoters' expert witness, admitted that he did not look at those in competition with the Promoters (their "competitors"), the competitors' output, or their output relative to the Promoters. And he did no test to determine which events are in competition with others. Finally, Dr.

Tollison, when pressed, admitted that his testimony regarding the Big Six market was instead derived from "common sense."

Furthermore, the district court concedes that Dr. Tollison "did not perform a study on the effect of the Two in Four Rule on consumers of Division I mens' games. According to Tollison, the loss of games necessarily constitutes a loss to consumers in the relevant market because college basketball events are not fungible." However products need not be fungible to be market competitors for the purposes of antitrust analysis. The Supreme Court has repeatedly held that "it is improper 'to require that products be fungible to be considered in the relevant market.'" *United States v. Continental Can Co.*, 378 U.S. 441, 449, 12 L. Ed. 2d 953, 84 S. Ct. 1738 (1964) (quoting *E. I. du Pont De Nemours & Co.*, 351 U.S. at 394). Rather than fungibility, the proper analysis "is an appraisal of the 'cross-elasticity' of demand in the trade." *E. I. du Pont De Nemours & Co.*, 351 U.S. at 394. Indeed, Dr. Tollison admitted that a cross-elasticity study is necessary to determine the relevant market, yet he concedes that he failed to perform such an analysis.

The district court, however, did not base its decision that the Two in Four Rule is anticompetitive simply on the Division I Mens' College Basketball market taken as a whole. Instead, the court held that "it is undisputed that the relevant market in this case is Division I mens' college basketball together with the appropriate submarket consisting of school-scheduled games," where school-scheduled games are defined as games that a team is not required to play but rather are selected by a school's scheduling coach. *Id.* at 951. Contrary to the district court's findings, however, the record suggests that the submarket is not undisputed.

Dr. Tollison did not testify that school-scheduled games are the relevant submarket, nor did he provide any basis for arriving at that conclusion. Rather, he opined that the relevant submarket is pre- and post-season tournaments, but because Tollison failed to provide any basis for that opinion, the district court correctly found it unreliable. Because the Promoters' failed to define the relevant market, and with it the submarket, the district court had ample basis to dismiss their claim. *See Nat'l Hockey League*, 325 F.3d at 719-20 (quoting *Tanaka*, 252 F.3d at 1063 (citing *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1105 (9th Cir. 1999))). Instead, however, the district court relied on what it found to be the opinion of the defendant's expert, Mr. Guth-that the relevant submarket is school-scheduled games-an opinion with which the court said Dr. Tollison had agreed. However, it is less than clear that Mr. Guth defines school-scheduled games as the relevant submarket. Admittedly, there is some evidence in the record which would support this proposition. For example, Mr. Guth stated that "in my view, the relevant market appears to be overall men's Division I basketball, and in particular, where the close substitution takes place in school-scheduled games and not solely in terms of the impact on the plaintiff promoter group." He also produced a report in which he stated that "the most important product, for purposes of this litigation, should be defined as school-scheduled games." At trial, however, when he was pointedly asked by counsel whether by this he was saying that the relevant market is school-scheduled games, Guth responded: "Neither in words nor in intent." Mr. Guth then clarified that while he believed that "the most important product, that is the close substitutes, in this litigation should be defined as school-scheduled games[,]" he nonetheless was "not saying that there is a school-scheduled game relevant market as that term is used by economists with antitrust matters." Given this record, it would be difficult to conclude that Mr. Guth named school-

scheduled games as the relevant submarket. Accordingly, we decline to relieve the Promoters of their burden based on such a dubious stipulation by the defendant's expert.

Because the Promoters failed to define the relevant market within which the significance of the allegedly anti-competitive effects can be gauged, and the record is not sufficient to support the district court's holding with respect to the relevant market, the Promoters cannot prevail on their claim that the Two in Four Rule violates Section 1 of the Sherman Act. *Nat'l Hockey League*, 325 F.3d at 719-20. Accordingly, we need not reach the question of whether the NCAA's Two in Four rule is anticompetitive or satisfies the rule of reason test. Nor do we reach the question of whether the Promoters have suffered the antitrust injury requisite to a showing of standing, see *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 99 (5th Cir. 1988); *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977) ("Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful."). Because the Promoters failed to meet their duty to define the relevant market and submarket, this court has insufficient information to reach the question of whether the Promoters suffered an antitrust injury-that is, an injury resulting from interference with "the economic freedom of participants in the *relevant market*." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 538, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983) (citing *United States v. Topco Assoc.*, 405 U.S. 596, 610, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972)) (emphasis added).

CONCLUSION

For the foregoing reasons, we REVERSE the judgment of the district court.

CONCURRENCE

GIBBONS, Circuit Judge, concurring.

I concur in the decision to reverse the judgment of the district court, but I would decide this case based on the plaintiffs' failure to establish that they have suffered an antitrust injury. Antitrust standing is a threshold matter that should be addressed before proceeding to other issues presented by an antitrust claim. In *HyPoint Technology, Inc. v. Hewlett-Packard Co.*, this court reasoned that, in view of the Supreme Court's articulation of the antitrust laws in numerous cases,

> it is appropriate to turn first to the issue of antitrust standing before weighing the issues of relevant market, market share, etc. In other words, before discussing the claims made in this case regarding relevant market and market power, we must determine if HyPoint has antitrust standing to assert claims under the Supreme Court's precedents.

949 F.2d 874, 876-77 (6th Cir. 1991). *See also Indeck Energy Servs., Inc. v. Consumers Energy Co.*, 250 F.3d 972, 979 (6th Cir. 2000) (finding no error in the district court's decision to dismiss claims because the plaintiff failed to meet its "standing threshold"); *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1146 (6th Cir. 1975) (noting that the district "court subsequently certified for appeal the *threshold* question of the standing of these investment firms to sue" under

antitrust law) (emphasis added); *Campus Ctr. Disc. Den, Inc. v. Miami Univ.*, 114 F.3d 1186, 1997 WL 271742, at *1 (6th Cir. 1997) ("As a threshold matter, proper assertion of an antitrust violation requires the demonstration of an antitrust injury.").

Here, in my view, it is unnecessary to consider whether the plaintiff promoters have met their burden of proving that a relevant market exists for Division I men's college basketball games. Assuming that such a market does exist, the Two in Four Rule does not interfere with the promoters' ability to compete in it. I have no doubt the Two in Four Rule is bad for the plaintiffs' business in the sense that it limits an advantage they have had over the promoters of non-certified events and the member institutions themselves, but the NCAA's decision to limit what is in effect a subsidy for these promoters is not the type of injury the antitrust laws were designed to prevent.

This court has said that "antitrust standing to sue is at the center of all antitrust law and policy. It is not a mere technicality. It is the glue that cements each suit with the purposes of the antitrust laws, and prevents abuses of those laws." *HyPoint Tech., Inc.*, 949 F.2d at 877. A private plaintiff may not recover damages or seek injunctive relief under the antitrust laws merely by showing an "injury causally linked to an illegal presence in the market." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977). To obtain relief, the antitrust plaintiff must prove "antitrust injury," which is to say, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the defendant's] acts unlawful." *Id.* The antitrust laws were intended to prevent injuries to competition. "Thus, antitrust injuries include only those injuries that result from

interference with the freedom to compete." *Johnson v. Univ. Health Servs., Inc.*, 161 F.3d 1334, 1338 (11th Cir. 1998). The antitrust injury element of standing ensures that a plaintiff can recover only for those losses that stem from the competition-reducing aspects of a defendant's behavior. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990). Focusing on whether a plaintiff has established antitrust injury forces courts to connect the alleged injury to the purposes of the antitrust laws. *Id.* at 342; Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, § 337, at 306 (2000).

In this case, no one has interfered with the promoters' freedom to compete in the market for Division I men's college basketball games. In Count I of their complaint, the promoters allege that the NCAA has conspired to restrain trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (1994), by "setting the prices" for college basketball games and by "promulgating regulations with the purpose and effect of restricting or eliminating" plaintiffs' events. In essence, plaintiffs claim that the Two in Four Rule impedes their ability to field a competitive mix of teams for their tournaments, which reduces their attractiveness and causes financial harm to the plaintiffs' business. Of course, antitrust plaintiffs do not suffer antitrust injury merely because they are in a worse position than they would have been had the challenged conduct not occurred. *See Brunswick*, 429 U.S. at 486-87. The antitrust laws were enacted to protect *competition*, not *competitors*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962), and unless the plaintiffs can connect their alleged injury to the purposes of the antitrust laws, they do not have standing to seek antitrust relief.

The plaintiffs here cannot make that connection. These promoters enjoy a subsidy provided by virtue of the NCAA's decision to exempt games that are played in certified events from the normal length of season rules, and the NCAA's decision to limit that subsidy has not caused the promoters to suffer an injury of the type the antitrust laws were designed to prevent. The fact that these tournaments are subsidized by the NCAA is demonstrated by how they began. In the 1960s, the NCAA started exempting participation in certain in-season tournaments from its maximum games limitation in response to concerns about the inability of teams in Alaska and Hawaii to schedule regular season games. In order to encourage teams to travel from the mainland to those states to play, the NCAA decided to allow the games to be played for "free," meaning that they would not count toward the total number of games teams were allowed to play each season. Exempt events initially had to be played outside of the continental United States, but in 1985 the NCAA began conferring exempt status on mainland tournaments like the Preseason NIT. In 1996, the NCAA started requiring tournaments seeking exempt status to go through an annual certification process, hence the name "certified tournament." Participation in a certified tournament now counts as one game for purposes of a team's maximum games limitation. This means that teams participating in certified events can play up to three or four games for the price of one, a feature that makes certified events especially attractive to teams. That is of course what the NCAA hoped to accomplish initially by exempting certain contests from its normal length of season rules. Certification and exemption also give the promoters of certified tournaments a substantial advantage when they are competing with the promoters of non-certified tournaments and the member institutions to schedule teams to play.

The Two in Four Rule is one of the ways the NCAA has tried to limit this subsidy that has encouraged an increase in the number of certified events. The rule prohibits teams from playing in more than one certified event during a given academic year and more than two certified events every four years. The promoters argue that the rule impedes competition in the market for college basketball games because it prohibits them from scheduling high profile teams like Connecticut, Duke, and Kentucky, teams that would otherwise be able to participate in their events every year.

Plaintiffs have not argued that a relevant market exists for certified events. As both parties agree, the relevant market is the market for college basketball games. Nothing about the Two in Four Rule prohibits these promoters from continuing to compete in that market. It does not deny the plaintiffs access to the necessary resources to compete in the market for college basketball games. Those resources are still available. If the promoters want Kentucky, they can get Kentucky every year (provided Kentucky wants to come), by promoting non-certified tournaments or a series of single-game events similar to the ACC-Big Ten Challenge. To do that, they would have to give up the advantage the subsidized format provides them and thus it may be more difficult for the promoters to schedule high profile teams, but forcing the promoters to make this choice has not caused them to suffer antitrust injury. If anything, the Two in Four Rule increases competition in the relevant market because it limits an advantage the promoters of certified events have had over the promoters of non-certified events and member institutions, and injury resulting from an increase in competition is certainly not the type of injury the antitrust laws were designed to prevent. *See Brunswick*, 429 U.S. at 487-88.

At bottom, the only injury the plaintiffs have suffered here results from the NCAA's decision to limit a benefit. In *Johnson v. University Health Services*, the Eleventh Circuit held that the plaintiff physician had not suffered antitrust injury as a result of the hospital's decision to deny her a loan guarantee and subsidies that were necessary to start an independent medical practice: "The only 'injury' that Dr. Johnson alleges is that [University Health Services] failed to confer an extraordinary benefit upon her. . . . Its decision not to subsidize [her] proposed practice is not the type of injury that the antitrust laws were intended to prevent." 161 F.3d at 1338. Similarly, plaintiffs in this case are arguing that the NCAA has caused them injury by failing to confer an extraordinary benefit upon them as often as they would like. This benefit is not required to be able to compete in the relevant market. In fact, the type of injury the plaintiffs are claiming here would be the same without regard to the amount of competition in the market. Antitrust injuries encompass "only those injuries that result from interference with the freedom to compete." *Id.* In this case, the plaintiffs have failed to establish that their alleged injuries are a result of the NCAA's interference with their freedom to compete in the market for college basketball games. They remain just as free to compete in that market now as they were before the adoption of the Two in Four Rule. The antitrust injury requirement demands that we consider whether these particular plaintiffs have suffered the type of injury the antitrust laws were designed to prevent. Because I believe they have not, I agree with the decision to reverse the judgment of the district court.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION

No. 2:00-CV-1439

[Filed, July 28, 2003]

WORLDWIDE BASKETBALL AND SPORTS TOURS, INC., et al., Plaintiffs,	)
v.	)
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant.	)

OPINION

EDMUND A. SARGUS, JR., UNITED STATES DISTRICT JUDGE. Magistrate Judge Mark R. Abel.

This matter is before the Court for consideration of Plaintiffs' Motion for Permanent Injunctive Relief to enjoin the Defendant National Collegiate Athletic Association's

["NCAA"] enforcement of the "Two in Four Rule." For the reasons that follow, the request for Permanent Injunction is GRANTED.

I.
Introduction and Summary

This case involves a claim by a group of sports promoters that the NCAA has violated federal antitrust law by limiting Division I college basketball teams from participating in more than two exempt tournament events in any four year period. For decades, the NCAA has treated certain tournaments as "exempt," meaning that teams may play in a series of games without each game counting towards the maximum number of games playable per season. In a policy known as 98-92, in 1999, the NCAA adopted a rule which required that no team play in more than two such tournament events every four years. ("Two in Four Rule.")

As described in detail below, in Section II(B), the rule has resulted in a 43% reduction in exempt tournament games, a 32% decrease in tournaments, and a 3.3% decrease in games scheduled by Division I teams.

Under traditional antitrust law analysis, the producers of a product -- in this case, men's college basketball -- may not combine and agree to a limitation on the output of such product. To a certain extent, the NCAA has the appearance and the ability to act as a horizontal combination of all college basketball teams and limit output, which would be clearly unlawful if undertaken by private business entities.

The NCAA, however, functions quite differently than traditional combinations designed to reduce output and limit competition. Courts have recognized, as outlined below in

Section V, that the NCAA has important rule-making functions, such as establishing the rules of the game, and protecting the welfare of student athletes. While acting in this rule-making capacity, the NCAA is not subject to traditional antitrust limitations.

Instead, the Courts have applied a concept known as the rule of reason, described in Section V. If the plaintiffs show that a rule of the NCAA has a substantially adverse effect on competition, the NCAA must justify the anti-competitive effect with countervailing beneficial justifications. As an example, if the NCAA concluded that the number of games played per season were adversely affecting the welfare of a student-athlete, an across the board reduction in number of games would have an anti-competitive effect, but would no doubt be justified.

In this case, as described in Section V(2), the Two in Four Rule has caused a substantial reduction in the number of school-scheduled basketball games. Under the rule of reason, the NCAA must establish a bona fide justification, demonstrating the virtues of the policy. The NCAA asserts that the rule limits the number of games played per season out of concern for student welfare, and gives lesser-known schools more opportunities to play in desirable tournaments. (Section V(2)).

Neither of these justifications are credible. At the same time the Two in Four Rule was adopted, the NCAA actually increased the overall number of games each team could play per season. Consequently, while the number of school-scheduled and exempt games were reduced, the overall number of games increased, hardly benefitting student welfare. (*See* Section V(3)). Further, the number of exempt games played by lesser-known, non-power conference teams

has actually decreased, resulting in harm to the class of teams which the NCAA claims its rule would benefit.

In the absence of an offsetting benefit, a rule which simply limits output and competition to the detriment of the consumer violates federal antitrust law. It is beyond dispute that the NCAA may limit the number of games playable per season and may promulgate rules which adversely impact promoters of sports tournaments. Because it is a combination of all producers of Division I men's basketball games, however, the NCAA may not act in an anti-competitive manner without promoting a beneficial interest.

II.

This action was filed by the Plaintiffs, who are sports promoters engaged in scheduling tournament-type events involving Division I mens' college basketball. The Defendant NCAA is an unincorporated association comprised of four-year colleges, universities and athletic conferences. Plaintiffs contend that the NCAA's "Two in Four Rule" is a violation of federal antitrust laws, specifically, §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

Plaintiffs' request for injunctive relief was first heard by the Court in mid-2002. On July 19, 2002, this Court issued an *Opinion and Order* holding Plaintiffs' request for permanent injunction in abeyance, pending further proceedings as to the effect of the Two in Four Rule in years three and four of the rule's cycle. On February 28, 2003, Plaintiffs renewed their request for permanent injunction, arguing that there now exists sufficient evidence to justify enjoining the rule as an antitrust violation. The NCAA disputes this contention. Before addressing the merits of the dispute, the Court provides a brief background summary.

The NCAA is a non-profit, tax-exempt organization headquartered in Indianapolis, Indiana. The NCAA essentially functions as a standard-setter, although in the area of mens' college basketball, it is also the sponsor of the well-known end of season NCAA Tournament. In its capacity as standard-setter, the NCAA establishes the maximum number of regular season mens' college basketball games that may be played by teams in Division I.[1]

In 1997, the NCAA began work on legislation known as Proposition 98-92. The rule applies to what are termed "exempt" events, which are multi-game tournaments. From their inception a number of decades ago, exempt events, which are typically held pre-season or during school vacation periods, did not count towards the cap on the number of games a team could play per season. The rule limits a team to playing one exempt event per season, and no more than two in any four year period. Further, an exempt tournament now counts as a single game towards the season limit, although the Plaintiffs do not challenge this portion of the rule. The Two in Four Rule, codified at NCAA Bylaw § 17.5.5.3 is a component of 98-92. The rule provides:

> **17.5.5.3 Certified Events.** An institution shall be permitted to participate in no more than one certified

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[1] Division I schools are typically large colleges or universities. By NCAA rules, Division I teams must play a large percentage of games against other Division I schools. Division I schools may offer athletic scholarships and are recognized as sponsoring the most competitive level of college athletics. There are currently 330 teams in Division I. Although this number varies from year to year as some teams drop out of Division I and other teams are added, the variance has never been more than 1/2 of 1% of the current number.

> event during a given academic year and not more than two certified events every four years. Participation in a certified events shall count as a single contest in the institution's maximum contest limitations. Such events, other than a foreign tour ... must be certified by the Championships / Competition Cabinet Subcommittee on Certified Events pursuant to Bylaw 30.10.1 ...

Defendant's Exhibit 1. The Two in Four Rule does not apply to the NCAA's post-season Tournament or to conference tournaments.[2] (NCAA Bylaw § 17.5.5.1.1). Proposition 98-92 was ultimately approved by the NCAA Board of Directors in January 1999. A separate component of the legislation was the provision of an additional game to the maximum allowed during the regular season. Thus, the number of games in the Division I mens' season increased from 27 to 28.[3]

As this Court observed in its first *Opinion and Order,* the issue of exempt events has been a concern of the NCAA and

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[2] Many Division I basketball teams play in conferences, such as the Big 10, the Big 12, the Big East, the Pac 10, the Southeast Conference and the Atlantic Coast Conference. G mes played in intra-conference championships or in the NCAA championship do not count as games played for purposes of the limitation on games played each year, as established by the NCAA.

[3] For the reasons explained in the Court's previous *Opinion and Order,* this part of the legislation will not be considered by the Court in assessing the effects of the Two in Four Rule on competition in the relevant market. As will be seen *infra,* however, the result in this case would remain unchanged, even if this unchallenged part of Proposition 98-92 were included in the analysis.

its institution members for some time. Initially, exempt events were required to be played outside the 48 contiguous United States, in the locales of Alaska, Hawaii or Puerto Rico. Later, the NCAA allowed the events to be played in the continental United States. In the late 1980s, the NCAA Presidents' Commission expressed concern over the impact of intercollegiate athletics on academics, particularly in the areas of mens' football and basketball. In 1990, the NCAA adopted bylaws to limit the number of regular season games, to regulate the start times for practices and the extent of pre-practice conditioning activities, to set the date for the start of a season and to limit the number of games any single student could play.

In 1990, the NCAA also adopted a "one in four rule," which restricted participation in any particular event to once in every four years. In the early 1990s there were few exempt events.[4] The events grew in number in the mid to late 1990s, as the following chart demonstrates:

Season Year	Exempt Events
1996-97	16
1997-98	19
1998-99	22
1999-00	26
2000-01	22
2001-02	25
2002-03	17

[4] In 1996, the NCAA began the process of "certifying" exempt events by way of a Certified Events Subcommittee.

This Court previously determined that the Plaintiffs had failed to establish harm under the antitrust law. Because the hearing was held during the second year of the Two in Four Rule, the Court permitted the Plaintiffs to re-apply for injunctive relief after the conclusion of the third year of the rule, when presumably any harm would be apparent. While this *Opinion and Order* addresses the issue of antitrust harm, the Court also incorporates the findings and conclusions reached in its previous Opinion and Order.

According to the Plaintiffs, the reduction in the number of events from 2000-2003 demonstrates that the Two in Four Rule has had a substantial adverse effect on output in the relevant market and, is a violation of federal antitrust law. The Defendant disputes this contention. The Court now considers the evidence adduced on both sides of the issue.

III.

A. Nonexpert Testimony as to the Effects of the Two in Four Rule

Plaintiffs have offered the testimony of eight fact witnesses in support of their request for permanent injunctive relief. Four of the witnesses, Mr. Richard Giles, Mr. Lee Frederick, Mr. Christopher Spencer and Mr. Louis Lacy, are promoters of certified exempt events.

Richard Giles, president of the Gazelle Group of Princeton, New Jersey, promoted four certified events in the 2001-02 season: the Coaches v. Cancer Classic, the BCA Invitational, the BCA Classic and the Guardians Classic. According to Giles, the Two in Four Rule had a devastating effect on certified events in 2002-03 season. The BCA Classic was cancelled in 2002-03 because no teams were available to

participate. Giles changed the format for both the BCA Invitational and the Coaches v. Cancer Classic to accommodate fewer participating teams. In Giles' estimation, the Guardian Classic had a much less competitive mix of teams participating, which caused fewer people to want to view the tournament this past season.

As for the upcoming season, 2003-04, Giles testified that he has one host site confirmed for the Guardian Classic and he has four teams, out of eight available slots, confirmed with contracts to participate. Giles noted that this number is down from the 2001-02 season when there were 16 available participating slots. For the upcoming BCA Invitational, Giles has secured contracts for teams in a four team tournament. In previous years, the tournament included eight teams. For the BCA Classic, Giles has eight teams under contract as well as a host, Xavier University. For the Coaches v. Cancer Classic, however, Giles has secured a contract with only one team. According to Giles, this tournament is particularly difficult to schedule because of the caliber of teams needed to satisfy the tournament's television contract with ESPN as well as the host site, Madison Square Garden in New York City.[5] Giles is of the belief that the tournaments have been unsuccessful[6]

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[5] Giles testified about the efforts he has made and continues to make to schedule teams to participate in his events. Giles places numerous calls and sends electronic mail (e-mail) to coaches and team schedulers in order to fill all available tournament slots. In particular, from June 1, 2001 to March 18, 2002, Giles sent 1,101 e-mails and made 2,020 calls regarding scheduling. In addition, Giles made thousands of calls to potential tournament sponsors. (Pl. Exhibit 175).

[6] The Court observes that in 2001 Giles promoted 4 events; but in 1998 and 1999 he only promoted 1, in 2000 he promoted 2 and in

because the Two in Four Rule has limited the number of teams available to participate in certified events in a given year and with that limitation, unique competition provided among teams in tournament format has diminished.

Giles testified that he persisted in these efforts during the pendency of the Court's ruling last year. Giles further testified that he continues to schedule teams for future events on the assumption that the Two in Four Rule remains in effect. In view of this unrebutted testimony, the Court rejects Defendant's assertion that the Plaintiffs' events were unsuccessful this past season due to lack of effort on Plaintiffs' part.

Lee Frederick, president of Sport Tours International of Milwaukee, Wisconsin also offered testimony as to the effect of the Two in Four Rule. Frederick has historically promoted three events which take place during the Thanksgiving or Christmas break. Frederick's events use an eight team, three day format. According to Frederick, only one of his events, in San Juan, Puerto Rico, took place as scheduled. One event was cancelled and another was altered to include six rather than eight teams. Frederick contends that he is unable to schedule some events or to fill others because the Two in Four Rule has limited the number of teams available to participate. Frederick testified that he has secured no contracts

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2002 he promoted 2.

for the San Juan event[7] in the upcoming year and has only secured two contracts for the New Orleans event.

Louis Lacy, a promoter for Blue Ridge Sports & Entertainment, Inc. ["Blue Ridge Sports"] of Winchester, Virginia, testified that he promotes events for mens' college basketball, as well as football and golf. The basketball events that Blue Ridge Sports promotes are the NABC Classic, the Cosida event and the America's Youth Classic. Lacy testified that in 2002, both the America's Youth Classic and the Cosida event were cancelled. The NABC Classic did take place, although with decreased ticket sales and a lower profit. On May 13, 2003, the NCAA Certified Events Subcommittee denied certification for the NABC Classic, America's Youth Classic and Cosida events for the 2003 season due to lack of executed venue and participating institution contracts. (Pl. Exhibit 265). Lacy testified that prior to 2002, he did not have difficulties scheduling teams and finding host sites.

Christopher Spencer, of Worldwide Basketball, Inc. in Cincinnati, Ohio, testified that in 2002 he was unable to organize any certified events. In 2001, however, Spencer promoted three tournaments in Las Vegas using a four game format. According to Spencer, the current difficulties are a result of the diminished supply of teams available to play caused by the Two in Four Rule. In his estimation, the lack of

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[7] On May 13, 2003, the NCAA Certified Events Subcommittee notified the University of Puerto Rico that the San Juan Shootout was being denied certification due to the lack of an executed contract with a participating institution as well as the lack of a manager/promoter contract. The deadline for reconsideration of the decision was June 15, 2003. (Pl. Exhibit 266). The Court notes that American University in Puerto Rico withdrew from the NCAA and was therefore unable to serve as a host school under NCAA rules.

teams also impacts upon the ability to find host schools for certified events. As for the upcoming season, Worldwide Basketball, Inc. has plans to promote only two tournaments. Spencer is attempting to sponsor an event at the University of Pittsburgh, which is the only team contracted to participate at this time. Spencer is also making efforts to secure teams for the Las Vegas Invitational. Spencer testified that he has sent out numerous contracts to teams in order to secure participation.[8]

In addition to the Plaintiff promoters, the Court heard testimony from four additional witnesses as to the alleged deleterious effects of the Two in Four Rule. Mr. Fernando Barrueta, who is president of the Hispanic College Fund, testified that his entity has sponsored three events in Division I mens' college basketball over the years. The events are held in Fresno, California, Albuquerque, New Mexico and Baton Rouge, Louisiana. Proceeds from the events are used to award scholarships to Hispanics on a merit and need basis. According to Barrueta, the Two in Four Rule caused the events to be less successful this past season because the competition among participating teams was weak. As a result, the revenues earned by the Hispanic College Fund declined $ 130,000.00 compared to the previous year.

Mr. Michael Levine, Chief Executive Officer of Van Wagner Sports and Entertainment also testified about the impact of the Two in Four Rule on team scheduling of mens basketball events. Three of Van Wagner's events were cancelled this past season due to inability to secure team

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[8] Spencer testified that it is not unusual, however, for teams to withdraw from events even after a contract for participation has been executed. Thus, according to the Plaintiffs, the existence of a contract does not necessarily guarantee team participation.

contracts. As a consequence, Levine made the decision in August 2002 to discontinue the Events division of Van Wagner Sports and Entertainment. Levine testified that if the Two in Four Rule were not in place, the events division would still be in business.

John Groce, Assistant Basketball Coach at Xavier University, testified that he has been responsible for scheduling events for his team for the past three years. Prior to that, Groce was responsible for scheduling events at three other universities. As a scheduling coach, Groce is the recipient of solicitations for event participation. Groce testified that the quality of the opposing team in an event is important to him. In addition, hosting events is important because it produces revenue for the university and gives his team a home court advantage.

Russell Potts, owner of Russ Potts Productions, Inc., a sports marketing company in Virginia, is involved in promoting mens' basketball and football exempt events. Potts has been involved in the sports promotion business for thirty-seven years. In the mid-1990s, he sold the Russ Potts Productions, Inc. business to Dorna Sports, of New York. Potts worked for Dorna for approximately one year and then resumed his own business under the Russ Potts Productions, Inc. name.

In Division I mens' basketball, Potts has promoted four events: the Colonial Classic, the Jim Thorpe Classic, the John Thompson Foundation Classic and the Hispanic College Fund Classic. Potts has used a four team format in tournaments which his company has sponsored. The events take place during the Thanksgiving and Christmas holidays. All four events took place in 2001, although Potts testified that it was difficult to secure team participation. In 2002, only three of

the four events took place due to the diminished number of available teams. According to Potts, two of the events lost money and one event was moderately successful. In addition, in 2001, Potts received over $ 100,000 from corporate event sponsors, but in 2002 no corporations sponsored his events. Potts testified that he has no events scheduled for 2003.[9]

B. Expert Testimony on the Effects of the Two in Four Rule

Dr. Tollison's Opinion

Dr. Tollison, Professor of Economics at Clemson University[10], provided expert testimony on behalf of Plaintiffs. Tollison is a well-known educator and writer in the field of economics. He holds a Ph.D. from the University of Virginia and an M.A. from the University of Alabama. Dr. Tollison has been a professor of economics since 1965. He has published hundreds of papers on economics and is the author of several textbooks on economic study. Tollison has received several Distinguished Faculty and various other awards throughout his career. Tollison is also a member of the Editorial Board of the *Journal of Sports Economics*. In 2001, he was named Researcher of the Year in the

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[9] The Court notes that in 2001 Potts promoted four events, the most events his company ever sponsored. In 1996, he promoted only 1 event, in 1997, 2 events; in 1998, 1 event; in 1999, no events because Dorna was the promoter; in 2000, 2 events; and in 2001, 4 events.

[10] Dr. Tollison begins this position in the upcoming academic year. He was formerly employed as a Professor of Economics at the University of Mississippi.

Department of Economics and in the School of Business at the University of Mississippi.

Tollison is of the opinion that the Two in Four Rule has had a substantial adverse effect on output in the relevant market, as demonstrated by the decrease in games as well as by the difficulty Plaintiffs have experienced in scheduling events during the past season as well as for the upcoming season. According to Tollison, the relevant market consists of all mens' college basketball games played in Division I.[11] He defines a relevant submarket as pre-season and post-season tournament event games, although he concedes that the submarket definition of Louis Guth, the Defendant's expert, as school-scheduled games[12], is also accurate. According to Tollison, games played in Division I are not fungible commodities. Therefore, Tollison testified that he did not find it necessary to perform a cross-elasticity study. Tollison concluded that the Two in Four Rule has had a substantial adverse effect regardless of whether the market or submarket is considered.

According to Tollison, the quality of the teams playing in Plaintiffs' events has an impact on price and output in the relevant market. Tollison measures quality by the experience of certified event promoters during the past season, as well as

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[11] Tollison relies on the views of coaches, athletic directors, NCAA officials, conference officials and commentators in support of this definition.

[12] School-scheduled events are games which a team is not required to play. Teams are required to play a certain number of games within the teams' conference, the conference tournament, or the NCAA tournament. School-scheduled games, as the term connotes, are selected by the school's scheduling coach.

the comments of sports writers and conference commissioners. According to Tollison, the diminished quality of teams has led to less interesting match-ups, reduced sponsorship, lower ticket sales and less media coverage of events.

Both Tollison and Guth agree that in the 2002-03 season a net reduction of seventy-two (72) exempt games occurred, in comparison to the 2001-02 season. This represents a 3.3% reduction in school-scheduled games. The number of games played in certified events declined by 107 from 2001-02 to 2002-03, from 251 to 144, or 43% of total certified games, and 28% of net games. In the same period, the number of certified tournaments dropped from 25 to 17, which represents a 32% reduction.[13]

As to the 2003-04 season, Tollison opines that the effect of the Two in Four Rule on certified events will be even more pronounced because there will be fewer eligible teams to participate (193) and only seven "power conference"[14] teams will be eligible. Tollison uses the 2001 season as the baseline

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[13] Both experts looked to a net figure since teams which one year played in, for example, a two game tournament, had one game counted toward the twenty-eight game cap. If the team did not play in any tournament games the next year, it would be able to schedule one additional game to make up for the fact that the previous year's tournament had counted as one game. The gross number of exempt games fell by 107 from 2001-2002 to 2002-2003.

[14] A "power conference" team refers to a team that is a member of one of the Big 6 conferences. The Big 6 consists of the Atlantic Coast Conference, the Big 12, the Big East, the Big Ten, the Pac 10 and the South East Conference.

for measuring the alleged substantial negative effect of the Two in Four Rule. According to Tollison, this is the appropriate measurement because it was the year when each team had an unfettered chance to participate in certified events.[15]

Tollison fails to find any procompetitive effects associated with the Two in Four Rule. According to Tollison, the rule is unlike other rules of the NCAA, such as regulation of season length. Further, Tollison believes that the rule does not advance the concern of athletes missing class time, since no specific provisions of the rule relate to scheduling around classes, vacations, travel, or other factors as to potential missed classes. Tollison also concludes that the rule has not advanced the ability of lesser known schools to participate in certified events.

Tollison believes that there are less restrictive alternatives than the Two in Four Rule that would achieve the objectives of the NCAA. First, Tollison contends that the NCAA should consider missed class time in all sports, not just mens' basketball. Second, the Two in Four Rule does not address

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[15] In contrast, Guth uses an "averaging" method to assess the effect of the Two in Four Rule. Guth testified that he would use a three year average of the number of games before the Two in Four Rule and compare that with number of games after the rule to assess the effect of the Rule. This method derives from Guth's view that the number of certified events in 2000-01 was unnatural because of the impending unknown effects of the Two in Four Rule. The Court rejects Guth's view on the appropriate baseline for measuring the effects of the Two in Four Rule since Guth provided no supporting data as to this theory. The Court agrees with Tollison that the logical baseline is the 2000-01 season because that is the year in which all teams were eligible to participate in certified events.

the scheduling or travel associated with the 4,830 games played by Division I teams not including the 144 exempt games played in 2002-03. Consequently, the rule cannot seriously affect student athlete welfare by targeting fewer than 2.2% of all games played in Division I. Third, in order to control the number of games played, Tollison contends that the NCAA could limit participation by teams to only one certified event per year. Tollison argues that this would better achieve the objective of enabling a non-power conference school to play a major school on a neutral court.

As stated above, Tollison did not perform a study of the effect of the Two in Four Rule on consumers of Division I mens' games. According to Tollison, the loss of games necessarily constitutes a loss to consumers in the relevant market because college basketball events are not fungible.

Defendant's Challenge to the Sufficiency of Tollison's Expert Testimony

As indicated during the Permanent Injunction Hearing, the Court now considers the Defendant's challenge under Fed. R. Evid. 702 to the sufficiency of Tollison's proffered opinion testimony. According to the Defendant, Tollison's testimony is deficient because he has failed to perform work to support his definition of the relevant market as well as to support his opinion that the Two in Four Rule has had a substantial anticompetitive effect in that market.

Rule 702 requires that the trial judge perform a "gatekeeping role" when considering the admissibility of expert testimony. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). The rule provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 702.

This Court's gatekeeping role is two-fold. First, the Court must determine whether the proffered testimony is reliable. *See Daubert,* 509 U.S. at 590. The reliability assessment focuses on whether the reasoning or methodology underlying the testimony is scientifically valid. *Id.* The expert's testimony must be grounded in the methods and procedures of science and must be more than unsupported speculation or subjective belief. *Id.* Thus, the proponent of the testimony does not have the burden of proving that it is scientifically correct, but by a preponderance of the evidence that it is reliable. *Wellman v. Norfolk & Western Railway Co.,* 98 F. Supp.2d 919 at 923 (S.D. Ohio 2000), citing *In re Paoli R.R. Yard PCB Litig.,* 35 F.3d 717, 744 (3rd Cir. 1994).

The Supreme Court in *Daubert* set out four non-exclusive factors to aid in the determination of whether an expert's methodology is reliable. They are:

> (1) whether the theory or technique has been tested;
> (2) whether the theory or technique has been subjected to peer review and publication;
> (3) the known or potential rate of error of the method used and the existence and maintenance of standards controlling the technique's operation; and
> (4) whether the theory or method has been generally accepted by the scientific community.

Daubert, 509 U.S. at 593-94.

In *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999), the United States Supreme Court stressed that, in assessing the reliability of expert testimony, whether scientific or otherwise, the trial judge may consider one or more of the Daubert factors when doing so will help determine that expert's reliability. *Id.* at 150. The test of reliability, however, is a flexible one and the four Daubert factors do not constitute a "definitive checklist or test" but must be tailored to the facts of the particular case. *Id.*, quoting *Daubert,* 509 U.S. at 593.

The particular *Daubert* factors that this Court considers depends upon the unique circumstances of the expert testimony involved. *See Kumho Tire Co.,* 526 U.S. at 151-52. As the Sixth Circuit has recognized, there is need for flexibility when the expert testimony at issue is non-scientific. *First Tenn. Bank Nat'l Ass'n v. Barreto,* 268 F.3d 319, 332 (6th Cir. 2001).

In this case, the Court finds that Tollison's proffered testimony as to the definition of relevant market is reliable. Tollison defined the relevant market as Division I mens' basketball, which is essentially the same market definition Tollison used when this Court first considered the merits of Plaintiffs' request for injunctive relief. Furthermore, the Defendant also uses Division I mens' college basketball as the relevant market.

Defendant's challenge to Tollison's testimony centers more on his definition of appropriate submarkets than on his definition of the market. As noted *supra,* Tollison defines one submarket as pre-season and post-season tournament games. As the Defendant points out, Tollison fails to offer a basis

from which to conclude that this is an appropriate definition. Rather, Tollison testified in conclusory fashion as to the definition and parameters of this submarket. Furthermore, in opining on the effects of the Two in Four Rule, Tollison failed to render any opinion as to the effect in the proffered submarket. The Court finds that Tollison's testimony as to tournament games submarket lacks a sufficient indicia of reliability to be admissible for purposes of Rule 702. Thus, the opinion is appropriately excluded.

The Court notes that Defendant also challenges the reliability of Tollison's definition of submarket on the basis that Tollison failed to perform a cross-elasticity analysis, *i.e.*, an empirical analysis of consumer sensitivity to price levels at which they elect substitutes for the product or service lost. The Court notes that, Louis Guth, the Defendant's expert, who is also a well-known writer in the field of economics, similarly failed to perform any of the studies which the Defendant asserts Tollison should have undertaken. Tollison concedes that he failed to perform a study but, in his view, a study was unnecessary because Division I mens' basketball games are not fungible. The Court finds that, while a such a study would be helpful to assess the effect of the rule on consumers, the lack of a study does not, by itself, render Tollison's opinion unreliable. The absence of a study affects the weight of Tollison's opinion as to the submarket of tournament games more than it affects its reliability under Rule 702. Nevertheless, as stated above, the Court finds that because Tollison offers no basis from which to conclude that a submarket of pre-season and post-season tournaments is an appropriate definition, the Court does find Tollison's submarket definition unreliable and the Court ignores the same.

The Court does note, as described *infra* in Section V, that Guth himself, in his earlier testimony, opined that the appropriate relevant submarket consisted of school-scheduled games. Tollison testified that, in his opinion, this definition of the relevant submarket was also accurate, and one he agreed provided proper analysis. To this extent, Tollison and Guth agree. As will be explained below, the Court believes that school-scheduled games are the relevant submarket.

Defendant presents an additional challenge to the reliability of Tollison's opinion as to the asserted anticompetitive effects of the Two in Four Rule. Defendant characterizes Tollison's opinion as "supported only by a series of tautological arguments based on untested assumptions, and self-serving, unchecked, inaccurate anecdotes." (*Motion in limine* at 3). In Tollison's view, the Two in Four Rule has had an anticompetitive effect whether viewed in the context of the overall market of Division I mens' basketball or in the context of a submarket because the number of games has declined. Tollison also finds anticompetitive effect by virtue of his belief that quality of games has diminished.

There is no dispute that the number of games has in fact declined. Thus, the Court finds no reason to reject Tollison's opinion that this decline constitutes an anticompetitive effect. With respect to quality, however, Tollison's opinion is less reliable. When questioned as to the indicia of quality on which he relies, Tollison stated that the purportedly less-interesting match-ups in certified events this past season were noted by sports commentators. Tollison further stated that there was reduced sponsorship revenues, ticket sales and media coverage. Tollison conceded, however, that he did not perform any studies to measure these purported effects on quality.

In the Court's view, because Tollison's testimony as to decline in quality is not supported by any objective evidence, testimony, or study, his opinion is unreliable for purposes of Rule 702. Thus, to the extent Tollison opines as to diminished quality because of the Two in Four Rule, his testimony is excluded.

Defendant's Motion to Exclude Tollison's proffered testimony (Doc. # 107) is GRANTED in part and DENIED in part.

Louis Guth's Opinion

Mr. Louis Guth, Senior Vice President of the National Economic Research Association, testified on behalf of the Defendant NCAA. Guth holds a Bachelor's degree in Economics from Harvard University and a Master's degree in Economics from the University of Pennsylvania. Guth has taught economics at the University of Pennsylvania and he has served as an Assistant Professor of Economics at the Graduate School of Business Administration at New York University. Guth has provided expert testimony in several antitrust cases and he has performed several economic studies in the area of regulatory matters. The Court concludes that both Guth and Tollison are highly-qualified experts.

Guth offers three opinions in this case: (1) the Two in Four Rule, and the larger piece of legislation, 98-92, are appropriate rule-setting standards by the NCAA to limit the number of season games as well as the number of games which count in the season; (2) the rule has a reasonable, pro-competitive effect; and (3) the overall effect of 98-92, including the Two in Four Rule, has been to increase output and create a framework for certified events to evolve.

In reaching these conclusions, Guth finds the relevant market to be Division I mens' college basketball. Guth defines the relevant submarket as school-scheduled games because those games are close substitutes for certified events in that market since both categories involve games for which schools receive invitations which may be accepted or declined. Guth testified that each school in Division I has approximately 11 slots to fill with games selected by the university or college. In Guth's view, these school-scheduled games are distinguishable from conference tournaments or the NCAA tournament. Guth therefore finds Tollison's definition of a submarket that includes these tournaments erroneous. As indicated above, the Court finds Tollison's definition of submarket as to tournament games to be unreliable. Tollison did, however, testify that Guth's definition of a submarket of school-scheduled games is also accurate. Both Guth and Tollison testified that an appropriate submarket consists of school-scheduled games. The Court agrees and adopts this submarket as the starting point of analysis.

Guth testified that the relevant market could consist of all Division I games, or school-scheduled games, the latter being the relevant submarket in his analysis given in the 2002 hearing in this case. Because schools are not free to schedule in-conference games or tournaments, but are free to schedule remaining games between single events or exempt games, this Court finds that school-scheduled events are the appropriate relevant market.

Guth takes issue with Tollison's opinion regarding the alleged anticompetitive effects of the Two in Four Rule. Guth contends that Tollison finds anticompetitive effects simply by focusing on the harm to Plaintiffs. Guth opines that even though there has been a decrease in certified events this past year, because there are close substitutes for the events, *i.e.*,

other school-scheduled games, this negates the effect of the loss in the relevant submarket.

Guth's opinion derives from his focus on Proposition 98-92 as a whole. Guth emphasizes that there are three aspects to the 98-92: (a) the Two in Four Rule, (b) a change that requires participation in an exempt event, regardless of the number of games played, to count as one game towards the season limit, and (c) the addition of the 28th game to the season. According to Guth, the overall effect of 98-92 is not anticompetitive. Further, Guth opines that 98-92 fosters competitive equity by creating uniformity among schools as to the number of games played in a season.

Guth contends that the Rule falls within the role of the NCAA to establish standards of play which is essential for the very existence of the product at issue -- Division I mens' college basketball. Therefore, according to Guth, the number of games played is always subject to the constraints of the NCAA. Guth testified that the decline in certified events from 25 to 17 this past season does not have a substantial anticompetitive effect on the overall market of Division I mens' basketball. Guth believes that the decrease reflects a reasonable market reaction. Further, Guth opines that the high number of certified events in the first two years of the rule is simply a consequence of teams scurrying to occupy events based on the fear of the unknown effect the rule would have in future years.

Guth noted that with the Two in Four Rule, there will be at most 165 teams eligible to participate in certified events each year, which means that there could still be between 15 to 25 certified events. The Court notes, however, that simply because teams are available does not mean that they will elect to participate in certified events or that the market could

support tournaments including lesser-known, non-power conference teams. The evidence presented at the hearing demonstrates this fact. All of the Plaintiffs have experienced difficulty in scheduling events and it is undisputed that the number of events and games played in those events has declined.

Guth testified that the rate of participation in certified events by "power" conference teams declined in 2002-03 to 24.8, from 33.5 in 2001-02. Guth contends, however, that this is mitigated because the rate of participation by non-power conference teams allegedly increased to 75.2, from 66.5 in the 2001-02 season. (Def. Exhibit 586P). Guth admitted, however, that the non-power teams for whom the Two in Four Rule was in part designed to benefit, played in fewer certified events in 2002-03. The number of games played by non-power teams declined by more than one-third in 2002-03.

In his testimony during the first hearing in this Court, Guth stated that the relevant submarket was school-scheduled games, which he noted in his more recent testimony, is still an accurate conclusion. Guth opines that even considering the submarket of school-scheduled games, the Two in Four Rule does not have a substantial anticompetitive effect. Again, Guth reaches this opinion by considering Proposal 98-92 as a whole and by maintaining that any actual loss of games in the market has to be considered in view of the fact that the product at issue is an NCAA-created product as well as the fact that, in his view, the rule has the effect of standardizing schedules.

Guth conceded on cross-examination, however, that while he believes mens' basketball games are fungible, there is more consumer demand for games between certain schools. Guth

did not perform cross-elasticity studies or pricing studies of the market. Further, Guth testified that he did not study the demographics of the types of people who attend certified events.

IV.

Plaintiffs' request for permanent injunction is made pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26, which provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws ... when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings ...

15 U.S.C. § 26.

In order to obtain an injunction under § 16 of the Clayton Act, the Plaintiff "must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986), quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977). Under this standard, the Plaintiff must demonstrate "a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur."

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969).

V.

Plaintiffs allege that the Two in Four Rule violates § 1 of the Sherman Act. This statute provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal ...

15 U.S.C. § 1.

The Supreme Court has explained the significance of the Act as follows:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and societal institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits 'Every contract, combination ... or conspiracy, in restraint of trade or commerce among the Several States.'

Northern Pacific R. Co. v. United States, 356 U.S. 1, 4-5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958).

Since, however, nearly every contract that binds parties to an agreed course of conduct "is a restraint of trade," to a certain extent, the Supreme Court has limited § 1 of the Sherman Act to only the prohibition of "unreasonable restraints of trade." *NCAA v. Board of Regents,* 468 U.S. 85, 98, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984). Thus, in order to prevail on a claim under § 1, the Plaintiffs must show that (1) there is an agreement, conspiracy, or combination between two or more entities; (2) the agreement is an unreasonable restraint of trade under either a *per se* or a rule of reason analysis; and (3) the restraint affects interstate commerce. *Law v. NCAA,* 134 F.3d 1010, 1016 (10th Cir. 1998).

With respect to the first element, there is no dispute that the Two in Four Rule was formed as a result of an agreement by NCAA members. It is the second element in this case which is the most contested. In its prior *Opinion and Order,* this Court held that the *per se* approach[16] does not apply to this case. This Court further held that the full rule of reason, rather than the quick look analysis, applies to the Plaintiffs' antitrust claim. As the Court held, the Two in Four Rule

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[16] The *per se* approach is applied "when 'the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.'" *NCAA v. Board of Regents,* 468 U.S. 85, 100, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984), quoting *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1, 19-20, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979). The types of restraints on trade that give rise to this analysis include price fixing, horizontal output restraints and market-allocation agreements. *Continental Airlines, Inc. v. United Airlines,* 277 F.3d 499, 509 (4th Cir. 2002). The Supreme Court has cautioned against expanding this category. *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 50, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977).

"simply does not have the 'obvious anti-competitive effects' ... so as to dispense with the full rule of reason analysis." (*Opinion and Order* at 13).

Under the full rule of reason analysis, Plaintiffs bear the initial burden of showing that the Two in Four Rule has a substantially adverse effect on competition. If this burden is met, the Defendant must then show the procompetitive virtues of the agreement. Once this is shown, the Plaintiff must show that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that the objectives can be achieved in a substantially less restrictive manner. *Law v. NCAA,* 134 F.3d 1010, 1019 (10th Cir. 1998). The object of the rule of reason inquiry is "to form a judgment about the competitive significance of the [challenged] restraint." *National Society of Professional Engineers v. United States,* 435 U.S. 679, 692, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978). With these requirements in mind, the Court proceeds to consider whether the Two in Four Rule violates § 1 of the Sherman Act.

Does the Two in Four Rule have a Substantially Adverse Effect on Competition?

1. The Relevant Market

In determining whether the Two in Four Rule has a substantially adverse effect on competition, the Court must first define the relevant product market. For antitrust purposes, the relevant product market is measured by "commodities reasonably interchangeable by consumers for the same purposes ...." *United States v. E.I DuPont de Nemours & Co.,* 351 U.S. 377, 395, 100 L. Ed. 1264, 76 S. Ct. 994 (1956). Thus, in order to ascertain the relevant product market, it is necessary to identify the products or

services that are either identical to or are available substitutes for the products or services at issue. This analysis is characterized as the "reasonable interchangeability" standard. The Supreme Court observed in *DuPont* that reasonable interchangeability can be measured by product uses, *i.e.*, whether substitute products or services can perform the same function, and/or by consumer response (cross-elasticity), *i.e.*, consumer sensitivity to price levels at which they elect substitutes for the product or service at issue. *Id.* at 395-96.

As to the issue of relevant submarket, the Sixth Circuit has explained that "a submarket analysis incorporates, but does not replace, the standard market test. It merely adds new factors to the that test so as to more precisely define the market affected by the defendant's actions." *White & White, Inc. v. American Hospital Supply Corp.*, 723 F.2d 495, 500 (6th Cir. 1983). In other words, "a submarket is a market, ascertained by traditional market analysis, which includes additional, not wholly different considerations." *Id.*

In this case, Plaintiffs submit that the relevant product market includes all games played in Division I mens' college basketball. The Defendant agrees with this definition of the relevant market. Plaintiffs' expert, Dr. Tollison, further opines that the relevant submarket is comprised of "tournament games, both pre-season and post-season." In contrast, Defendant's expert, Mr. Guth defines the relevant submarket as school-scheduled games. According to Guth, because certified events are scheduled by the school, any other game that the school schedules upon being solicited, would be a close substitute for certified event games. As Guth testified, the structure of the NCAA Division I season results in schools having approximately eleven slots to fill each year through their own scheduling efforts. Thus, according to Guth, it makes sense to consider scheduled events as close

substitutes rather than "tournament games" as Tollison opines.

As to the relevant market, this Court concludes that it is Division I mens' college basketball. To the extent consideration of a submarket is appropriate, the Court finds that it is comprised of school-scheduled games. In the Court's view, events that are scheduled by the schools themselves are close substitutes for each other. Furthermore, as stated *supra,* the Court finds Tollison's opinion as to the definition of submarket unreliable for purposes of Rule 702.

The Court notes that, at the first hearing of this action, Tollison did not opine as to a relevant submarket. His opinion was rendered prior to the most recent hearing. Defendant has claimed unfair surprise as a result of Tollison's opinion. The Court finds Defendant's argument in this regard without merit for two reasons. First, Defendant's own expert, Louis Guth, opined as to a relevant submarket over one year ago when this matter came before the Court for the initial injunction hearing. Second, and more importantly, as the caselaw reveals, the submarket analysis "merely adds new factors to the test [for relevant market] so as to more precisely define the market affected by the defendant's actions." *White & White, Inc. v. American Hospital Supply Corp.*, 723 F.2d 495, 500 (6th Cir. 1983). Thus, because the submarket analysis involves looking at additional and not wholly different considerations and because Defendant's own expert first opined on the theory, the Court cannot conclude that the Defendant is prejudiced by the Court's application of a submarket analysis. Moreover, as concluded above, the Court has rejected Tollison's definition of submarket and the Court has adopted Guth's definition.

With the relevant market and submarket defined, the Court now considers whether Plaintiffs have satisfied their initial burden of showing a substantial adverse effect on competition.

2. Effect on Competition

Ordinarily, the Plaintiff shows a substantial adverse effect on competition in the relevant market with evidence that the Defendant's role in the market is such that it impairs competition significantly. "However, if a Plaintiff can show 'that the restraint has actually produced significant anti-competitive effects, such as a reduction in output,' a formal market analysis is unnecessary." *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839, 847-48 (9th Cir. 1996), quoting *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991). Under the rule of reason, Plaintiffs must show that a concerted attempt by Defendant to reduce output and drive up prices or otherwise reduce consumer welfare. *Consolidated Metal Products, Inc. v. American Petroleum Inst.*, 846 F.2d 284, 292-93 (5th Cir. 1988). This requirement stems from the principle that the antitrust laws protect competition, not particular competitors. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962).

At the time of the initial hearing on this case, the Court concluded that there was insufficient evidence to show whether the Two in Four Rule would have a substantially adverse effect in the market. The Court reached this conclusion because the effect of the rule on certified event tournaments in years three and four remained to be seen. As the Court stated, it could not "grant injunctive relief based on speculation as to the nature and extent of the purported injury or to the extent that competition may be diminished in years three and four of the rule." (*Opinion and Order* at 27). One

year has now elapsed since the Court made this ruling and the Plaintiffs have come forward with evidence as to the effects of the rule in year three.

The evidence presented at the Permanent Injunction Hearing shows that the Two in Four Rule has indeed had an effect on the number of certified events played. It is undisputed that the number of certified events declined from 25 in the 2001-02 season, year two of the rule, to 17 in the 2002-03 season, year three of the rule. The number of actual games played in certified events decreased from 251 in the 2001-02 season to 144 in the 2002-03 season, for a loss of 107 games. In addition, the evidence adduced at the hearing shows that 11 certified events were canceled in the 2002-03 season and 5 events went forward with a reduced field, *i.e.*, fewer games and fewer teams participating. The evidence also shows that even fewer certified events will go forward in the upcoming year, which is year four of the rule.

In addition, and most importantly, it is undisputed that the decline in certified events is part of a decline in output of games in the submarket--school-scheduled games. The undisputed testimony demonstrated a net decline of 72 exempt games, which represents 3.3 % of all school-scheduled games. The evidence also reveals that the overall number of school-scheduled games declined by 4.15 %, or 85 games, from year two to year three of the challenged rule. Of the 85 game decline, 72 were represented by the net loss of exempt games. The Court bases these percentages on the total number of school-scheduled games equaling 1,962.

In 2001-02, there were a total of 2,047 school-scheduled games. (Defendant's Exhibit 586MM). At the hearing, Plaintiff's presented evidence that, in 2002-03, there were only 1,882 school-scheduled games. (Plaintiffs' Exhibit 279).

Defendant challenges the accuracy of this number but nevertheless concedes that there was a decline. Following the hearing, Defendant filed a motion to exclude the Court's consideration of the 1,882 figure on the basis that it "simply takes Division I appearances against Division I opponents and divides by two ... ignoring the hundreds of games played by Division I schools against non-Division I opponents." (Doc. # 130 at 1-2). The Defendant submits that the actual number of school-scheduled games in 2002-03 is 1,998. (Proffered Defendant Exhibit 586 LL). In response, Plaintiff states that it accepts this figure but asserts that the number should be decreased by 36 in order to achieve the most accurate figure. According to Plaintiff, there were three new teams in Division I in 2002-03 which did not compete in Division I in 2001-2002. These three teams played a total of 70 school-scheduled games, two against non-Division I opponents. The addition of the new teams therefore added 36 school-scheduled games to the output in 2002-03.

In the interest of relying upon the most factually accurate data, the Court finds that 1,962 games were played in school-scheduled events in 2002-03. The Court notes that this figure represents a decline in actual number of games in the relevant submarket from the 2,047 number of the previous season.

Plaintiffs argue that the foregoing evidence is sufficient to satisfy their initial burden under the rule of reason analysis, *i.e.*, that the Two in Four Rule has a substantially adverse effect on competition. The Defendant contends that Plaintiffs have shown nothing more than an adverse impact on their own businesses. Defendant further contends that the lack of a cross-elasticity analysis in the relevant market is fatal to Plaintiffs' claims because without the study, the market is not sufficiently defined.

While it is true that, for purposes of an antitrust claim, the outer boundaries of the relevant market are defined by the reasonable interchangeability, or cross-elasticity, of the demand for the product and substitutes for it, *see e.g., Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3rd Cir. 1997), it is undisputed that the relevant market in this case is Division I mens' college basketball together with the appropriate submarket consisting of school-scheduled games.

In light of the clear definitions in this case as to relevant market and submarket, the Court finds that the Plaintiffs' failure to perform cross-elasticity studies is not fatal to their antitrust claim. While such a study certainly may have been helpful to assess the effect on consumers of the decrease in output of certified events, the Court concludes that the undisputed decrease in output in the relevant submarket of school-scheduled events is sufficient to show that the Two in Four Rule has led to an adverse effect on competition. As noted *supra,* if the Plaintiffs show that the restraint at issue has actually produced significant anti-competitive effects, such as a reduction in output,"a formal market analysis becomes unnecessary." *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991).

The Defendant nonetheless contends that a reduction of 85 games in comparison to the approximate 5,000 Division I games played is not a substantial adverse effect. Initially, the Court notes that the relevant submarket is school-scheduled games, which, as described above, included 1,962 games played by Division I teams. The effect of the reduction is not insubstantial. It is undisputed that school-scheduled games, and certified events in particular, are very popular among fans of Division I mens' college basketball. The decline in the number of games in the submarket means the product is less available to meet consumer demand.

The effect in this case is similar to that addressed by the United States District Court for the Northern District of Illinois found in *Chicago Professional Sports Limited Partnership, et al. v. National Basketball Association,* 754 F. Supp. 1336 (N.D. Ill. 1991). In that case, the owner of the Chicago Bulls, a professional basketball team, and WGN TV, a superstation that broadcasts professional basketball games from the Chicago area, sued the National Basketball Association ["NBA"] to enjoin its rule that each team could broadcast no more than 20 games on a television "superstation [17]." The previous rule allowed up to 25 games to be broadcast on television superstations. The court found the 20 game rule to violate the rule of reason. The court stated:

> Adverse effects are directly observable ... The 5-game restriction demonstrably reduces the number of games available to viewers nationwide and the options open to advertisers for reaching those viewers, as well as the competition between teams and the league, and superstations and the networks in the national television market, and without evidence of any commensurate gains ... On the present evidence, the restraint imposed by the 5-game reduction suppresses

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[17] A "superstation" was defined by the NBA as "any commercial over-the-air television station whose broadcast signal is received outside of the local Designated Market Area ("DMA"), as defined by A.C. Nielsen Co., by more than 5% of the total number of cable subscribers in the United States as reported by A.C. Nielsen ...." *Chicago Professional Sports Limited Partnership v. NBA,* 754 F. Supp. 1336, 1345 (N.D. Ill. 1991). Further, at the time of the decision, there were three superstations in the United States: WGN in Chicago, WTBS in Atlanta and WWOR in New York. All stations televised NBA games and WGN reached 31% of the nation's television households. *Id.* at 1345-46, 1348.

> competition without promoting it. It is therefore unlawful.

Id. at 1363-64.[18]

Similarly, in the case at bar, the Two in Four Rule has had the undisputed effect of reducing the number of games available to viewers and fans of Division I mens' basketball in the relevant submarket. While the Defendant argues that

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[18] The Court notes that Plaintiffs rely on this case in their post-hearing brief. On July 14, 2003, Defendant filed a Motion Strike Plaintiffs' reliance on the case as inappropriate in light of the alleged "subsequent reversal and vacation of the injunction by the Seventh Circuit in *Chicago Professional Sports, Ltd. v. National Basketball Association,* 95 F.3d 593 (7th Cir. 1996)." The NCAA's characterization of the subsequent history of the district court's underlying decision is inaccurate. The 1991 decision by the United States District Court for the Northern District of Illinois was affirmed by the Seventh Circuit in *Chicago Professional Sports, Ltd. v. NBA,* 961 F.2d 667 (7th Cir. 1992). The Seventh Circuit denied a rehearing *en banc* in June 1992. Thus, pursuant to the decisions, the Chicago Bulls and the WGN Superstation were permitted to broadcast 25 games per year. The district court in Illinois later considered whether the number could be increased to 30 games per year and whether the NBA could impose a "tax" on the games' broadcast to a national audience. The district court held that a thirty game allowance was permissible but found the NBA's tax excessive. *Chicago Professional Sports. Ltd. v. NBA,* 874 F. Supp. 844 (N.D. Ill. 1995). This decision was vacated by the Seventh Circuit and the case was remanded for further proceedings, *Chicago Professional Sports, Ltd. v. National Basketball Association,* 95 F.3d 593 (7th Cir. 1996). Thus, it is wholly inaccurate to characterize the holding of the district court in 1991 as being reversed and vacated. The Defendant's Motion to Strike (Doc. # 139) is DENIED.

any loss is insubstantial, the Court disagrees and concludes that the reduction in output is sufficient to show an adverse effect for purposes of the rule of reason analysis. Plaintiffs have satisfied their initial burden.

3. Procompetitive Virtues of the Two in Four Rule

The second part of the rule of reason analysis requires that the Defendant come forward with evidence to show the procompetitive virtues of the Two in Four Rule. In this regard, the Defendant NCAA contends that the rule (1) furthers the goals of competitive equity between large and smaller schools, (2) furthers the goal of students avoiding missed class time, and (3) makes a more uniform season by stabilizing schedules and preventing an excessive number of games from being played.

The NCAA argues that its enactment of the Two in Four Rule falls within its authority as standard-setter for collegiate athletic sports. The NCAA points out that it has long been responsible for setting limits as to season length, the number of games and the duration of practices in all the sports which it oversees. Further, the NCAA argues that the limits that it establishes are necessary for the product of mens' college basketball to be available at all.

The NCAA's characterization of its role in college sports is indeed important. As the Supreme Court observed in *NCAA v. Board of Regents,* 468 U.S. 85, 88, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984), "since its inception in 1905, the NCAA has played an important role in the regulation of amateur collegiate sports." The NCAA "has adopted and promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic

squads and coaching staffs." *Id.* Further, while the rules enacted by the NCAA may limit output in the relevant market, as the Supreme Court observed in the *Board of Regents* case, "what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 101. Thus, "the NCAA's motives must be accorded a respectful presumption of validity, [but] it is nevertheless well-settled that good motives will not validate an otherwise anticompetitive practice." *Id.*, n.23 (citations omitted).

The Court finds this observation particularly applicable to this case. In the Court's view, the justifications offered by the NCAA in support of the Two in Four Rule are insufficient to insulate it from antitrust liability. The Court is cognizant of the fact the NCAA occupies the unique position of standard-setter in the market of Division I mens' basketball. Nevertheless, this role does not allow the NCAA to act in a manner that restrains competition in a manner that is anti-competitive, unless the NCAA can demonstrate an offsetting beneficial effect. As stated above, the Court finds that the Two in Four Rule has had a substantial adverse effect on competition. Moreover, as described *infra,* the Court finds that the goals proffered by the NCAA in support of the rule fail to justify the adverse effect.

As to the goal of competitive equity, the evidence adduced at the hearing shows that fewer teams will be able to participate in certified events because there are fewer events that will go forward. More importantly, the teams which the NCAA claims it intended to benefit -- the lesser known, non-power conference teams -- played in substantially fewer exempt games in 2002-03 than in the previous years. In addition, it is undisputed that certified event promoters, such as Plaintiffs, have had greater difficulty securing teams to

play in certified events because of the reduction in eligibility caused by the rule. In view of this evidence, the goal of competitive equity is hardly being achieved.

The NCAA also contends that the rule is necessary to maintain the welfare of the student athlete. Because certified events are most often played during times when the student-athletes are on scheduled school breaks, for the Thanksgiving and Christmas holidays, the goal of promotion of student-athlete welfare has little, if any, effect. In the Court's view, if the NCAA truly had the best interests of athletes as students in mind, it would limit the number of games being played while school is in session, such as during the well-known NCAA tournament, which takes place during the spring college semester. The Two in Four Rule only affects, at most 5% of the total games played by Division I teams. If student welfare were the justification, to be effective, the rule would certainly have to regulate the other 95% of games played.

Further, the Court notes that at the same time as the passage of the Two in Four Rule, the NCAA actually raised the number of games, from 27 to 28, which a team may play each season. Thus, the total number of games played in Division I has increased as follows:

Season	Division I Games
1999-2000	4,911
2000-2001	4,930
2001-2002	5,043
2002-2003	4,974

(Defendant's Exhibit 586 LL-1).

The total number of games played per year in each of the three years following the adoption of 98-92 is greater than the total in the year preceding the implementation of the rule. What these numbers show is that after the enactment of the Two in Four Rule the total number of games played by Division I teams actually increased while the number of games played within the submarket of school-scheduled games decreased and the number of exempt games plummeted. It is disingenuous for the NCAA to claim that the Two in Four Rule, which has reduced the number of exempt games, was intended to promote student welfare by limiting the number of games, while simultaneously increasing the overall number of games each team may play. Thus, even if this Court were to consider the effect of the 28th game on Plaintiffs' claim, the result would remain unchanged. The NCAA's attempt to justify this anticompetitive restraint in the name of student-athlete welfare is not credible.

Finally, the Court finds that the Two in Four Rule has done virtually nothing to achieve a standardized playing season, the third goal proffered by the NCAA in support of the rule. The rule does not require that exempt tournaments be played in certain months, nor does the rule limit the exempt tournaments to dates not in conflict with class schedules. The rule does not equalize the number of games each team ultimately plays, since it excludes conference tournaments and the NCAA tournament, which alone may include up to six extra non-counting games for the winning team.

In sum, the Court finds that the justifications offered by the NCAA in support of the Two in Four Rule fail to satisfy their burden under the Rule of Reason analysis of overcoming the anticompetitive effects of the rule.

4. Less Restrictive Alternatives

If the Defendant is successful in offering procompetitive virtues of an otherwise anticompetitive restraint, the third prong of the rule of reason analysis requires consideration of less restrictive alternatives to the restraint. The Plaintiff bears the burden on this issue of establishing that the rule is not reasonably necessary to achieve the legitimate objectives of the restraint or, that the objectives offered could be achieved in a substantially less restrictive manner. *See Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998).

Since the Court concludes that the Two in Four Rule has a substantial anticompetitive effect in the submarket of school-scheduled games and, since the Court concludes that the allegedly procompetitive justifications offered by the NCAA fail to overcome the anticompetitive effects, the Court need not consider whether there are less restrictive alternatives to the Two in Four Rule.

VI.

For the reasons stated above, this Court concludes that the Two in Four Rule enacted by the NCAA has a substantially adverse effect on competition and amounts to a violation of § 1 of the Sherman Act, 15 U.S.C. § 1. The NCAA is hereby PERMANENTLY ENJOINED from enforcing the Two in Four Rule. Plaintiffs' request for Permanent Injunction is GRANTED.

IT IS SO ORDERED.

DATE 7/28/03
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 2:00-cv-1439

[Filed July 19, 2002]

WORLDWIDE BASKETBALL AND SPORTS TOURS, INC., et al., Plaintiffs,	)
v.	)
NATIONAL COLLEGIATE ATHLETICASSOCIATION, Defendant.	)

OPINION AND ORDER

JUDGE EDMUND A. SARGUS, JR. Magistrate Judge Mark R. Abel

This matter is before the Court for consideration of the Plaintiffs' Motions for Preliminary and Permanent Injunctive Relief to enjoin the Defendant NCAA's enforcement of the "Two in Four Rule." The Court heard testimony on both of the motions over a four-day period. For the reasons that

follow, the Plaintiffs' Motion for Preliminary Injunction is denied and Plaintiffs' Motion for Permanent Injunction is held in abeyance.

I.

Plaintiffs, Worldwide Basketball and Sport Tours, Inc., the Gazelle Group, Inc., Sports Promotions, LLC and Sports Tours International ["Plaintiffs"], commenced this action on December 21, 2000 against the National Collegiate Athletic Association ["NCAA"] alleging that the NCAA's enforcement of-the "two in four" rule is a violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. On August 6, 2001, the Plaintiffs filed a Motion for Preliminary Injunction. The parties engaged in discovery and a hearing date was established. Prior to the hearing, the parties consented to the consolidation of the hearings on the requested preliminary and permanent injunctions. The Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331.

Plaintiffs are engaged in the business of promoting sporting events, including events which involve Division I mens' college basketball. Among the events which Plaintiffs have promoted over the years are: the Puerto Rico Shootout, the Puerto Rico Holiday Classic, the Coaches v. Cancer Challenge, the National Association of Basketball Coaches Classic, the San Juan Shootout, and others. The Plaintiffs are arrangers of these events but are not themselves the sponsors of the events.[1]

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[1] With respect to sponsoring agencies, NCAA Bylaw 30.10.1.3 provides:

> The sponsoring organization of arty certified event shall be either an active or affiliated member or a

The NCAA is an unincorporated association of approximately 1,200 members comprised of four-year colleges and universities and athletic conferences. The NCAA is a non-profit, tax exempt organization headquartered in Indianapolis, Indiana. The NCAA essentially functions as a standard-setter, although in the sport of mens basketball, it also acts as a sponsor of the well-known end of season NCAA Championship Tournament.

The Two in Four Rule applies to basketball teams comprising Division I of the NCAA, which encompasses 319 of the largest schools and their athletic conferences.

The Two in Four Rule is codified at NCAA Bylaw § 17.5.5.3, which states:

17.5.5.3 Certified Events. An institution shall be permitted to participate in no more than one certified event during a given academic year and not more than

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member conference of the Association. An institution that is a sponsoring organization must conduct the sport of basketball on the intercollegiate level. For certified events in Alaska, Hawaii, or Puerto Rico, the sponsoring agency must be an active or provisional NCAA member located in that state or territory. If a sponsoring agency wishes to conduct a certified event in a U.S. state or territory outside of the contiguous 48 states (e.g. Alaska, Hawaii, Puerto Rico, Virgin Islands), all competition in the event must take place within such state or territory.

Defendants Exhibit 1.

> two certified events every four years. Participation in a certified event shall count as a single contest in the institution's maximum contest limitations. Such events, other than a foreign tour...must be certified by the Championships/Competition Cabinet Subcommittee on Certified Events pursuant to Bylaw 30.10.1 ....

Defendant's Exhibit 1.

The NCAA is responsible for establishing the maximum number of regular season mens' college basketball games that may be played in Division I. Exempt events, *i.e.*, events which include games that do not count against the regular season maximum number of games, have been played in college basketball since the 1960's. The events follow a tournament format in which teams, generally between four to eight, play 2, 3 or 4 guaranteed games. Regardless of the number of games actually played, teams playing in a certified tournament were credited with only one game played for purposes of calculating the total games allowable in a single season.

Initially, exempt events were required to be played outside the contiguous 48 United States, in the locales of Alaska, Hawaii or Puerto Rico. The exemptions were appealing to teams for the opportunity to play "free" games and to travel. Later, the NCAA permitted exempted tournaments to be played in the continental United States. In 1985, the NCAA created additional exemptions for two events: the Preseason NIT and the Preseason Basketball Hall of Fame games.

In the late 1980's the NCAA, at the behest of the President's Commission, studied student athlete welfare. As a result of the study, the NCAA concluded that intercollegiate

athletics, especially football and basketball, were interfering with the academic demands placed on the student athlete. As a consequence, in 1990, the NCAA Convention concluded that reduction in time demands for students playing the sports of football and basketball were warranted. The Convention adopted bylaws limiting the number of regular season games; the start of practices; the extent of pre-practice conditioning activities; the start of the season; and the number of games any single student could play.[2] The Convention also adopted a "one in four rule," which restricted participation in any particular event to once in every four years. In 1990, there were few exempt events. By 1994-95, the number of such events grew to 10; in 1998-99 there were 19 and in 2000-01, there were 25.

In 1996, the NCAA began the process of "certifying" exempt events, thus leading to the designation "certified events." Events gained certification by way of approval of a certified events subcommittee of the NCAA. As the number of events grew, some teams were able to play a greater number of such events which, regardless of the number of games actually played, counted as only one game.

In 1997, legislation[3] was drafted that eventually became Proposal 98-92. The proposal included the following: (1) Division I schools could play 28 rather than 27 games per season; (2) participation in any exempt event would Count as a single game; (3) schools could play any particular exempt

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[2] Unfortunately, these measures have had little effect. The number of men participating in Division I - A basketball who graduate from college is only 32%, the lowest of any college sport. (The Knight Commission, NCAA Report issued September 8, 2001).

[3] The NCAA refers to its rules as "legislation."

event only once in four years; and (4) schools could play only one event per year. In July 1998, the Events Contest Subcommittee approved the legislation and it was forwarded to the Division I member institutions for comment.

In September 1998, the Championship and Competition Cabinet reviewed and modified Proposal 98-92, adding the "two in four" rule. The amendment was approved by the Management Council in October 1998 and by the Board of Directors in January 1999. The two in four rule does not apply to the post-season NCAA Tournament, nor does it apply to conference tournaments, which are part of the regular season. (NCAA Bylaw § 17.5.5.1.1). Consequently, teams which play in these tournaments have none of the games counted toward the maximum permissible number of games per season. Furthermore, there is currently a moratorium by the NCAA on certification for new exempt events.

Plaintiffs challenge the two in four rule as a violation of §§ 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2.

II.

Standard for Injunctive Relief

The Court will first resolve the parties' disagreement as to the appropriate standard in an antitrust action seeking preliminary and permanent injunctive relief. Plaintiffs' request for preliminary and permanent injunction is brought pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26, which provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any

> court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws... when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings ....

15 U.S.C. § 26.

The United States Supreme Court has held that, in order to obtain an injunction under § 16, an antitrust Plaintiff "must allege threatened loss or damage of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113 (1986), *quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

Plaintiffs rely on the foregoing in seeking relief in this Court. The Defendant NCAA does not refer to § 16 of the Clayton Act but rather, simply relies upon the standard applicable to injunctions generally. With respect to Plaintiffs' request for permanent relief, the Defendant argues that Plaintiffs must show that they "will actually suffer continuing irreparable injury in the absence of the permanent injunction.. . ." (*NCAA's Bench Memorandum Regarding Permanent Injunction Standard at 3)*. Defendant cites to the Sixth Circuit decisions of *United States v. Szoka,* 260 F.3d 516 (6th Cir. 2001) *and Kallstrom v. City of Columbus,* 136 F.3d 1055 (6th Cir. 1998) in support of this position.

In *Szoka,* the Sixth Circuit reviewed the issuance of a permanent injunction entered against an individual who made unauthorized radio transmissions without a license in violation

of the Federal Communications Act of 1934, 47 U.S.C. § 301. The injunction was issued under 47 U.S.C. § 401(b).[4] The appellant argued that the district court erred in issuing the injunction without considering the standard applicable to permanent relief generally; that is, "whether the plaintiff has demonstrated (1) a continuing irreparable injury if the court fails to issue the injunction, and (2) the lack of an adequate remedy at law." *Szoka,* 260 F.3d at 522, citing *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1067 (6th Cir. 1998). The Sixth Circuit rejected this argument and concluded that the district court did not err because Congress provided, by statute, the basis for the issuance of equitable relief.

Section 16 of the Clayton Act is similar to the statute at issue in *Szoka,* insofar as the statute provides the basis for

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[4] The statute provides:

> If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, ant that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.
>
> 47 U.S.C. § 401 (b)

injunctive relief. Section 16 specifically provides that private parties may sue for injunctive relief as to "threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26. Under this standard, a plaintiff must demonstrate "a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969). Thus, contrary to Defendant NCAA's assertion, demonstration of actual injury, in the sense traditionally applied to permanent injunctions generally, is not required for purposes of § 16.

Nonetheless, the law is clear that in order to obtain preliminary or permanent injunctive relief under § 16 of the Clayton Act, Plaintiffs must prove the existence of "some cognizable danger" of violation of the type the antitrust laws are designed to prevent. *Law v. NCAA*, 185 F.R.D. 324, 349 (D. Karl. 1999), citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

With this standard in mind, the Court proceeds to consider the merits of Plaintiffs' request for preliminary and permanent injunctive relief.

III.

Plaintiffs' Request for Injunctive Relief

Section I of the Sherman Act

Plaintiffs claim that the two in four rule violates § 1 of the Sherman Act. The statute provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or

> commerce among the several States, or with foreign nations, is declared to be illegal ....

15 U.S.C. § 1.

In *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 4-5 (1958) the Supreme Court explained the significance of the Act:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the role of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits 'Every contract, combination.., or conspiracy, in restraint of trade or commerce among the Several States.'

Since, however, nearly every contract that binds parties to an agreed course of conduct "is a restraint of trade," to a certain extent, the Supreme Court has limited § 1 of the Sherman Act to only the prohibition of "unreasonable restraints of trade." *NCAA v. Board of Regents,* 468 U.S. 85, 98 (1984). Thus, in order to prevail on a claim under § 1, the Plaintiffs must show that (1) there was an agreement, conspiracy, or combination between two or more entities; (2) the agreement was an unreasonable restraint of trade under either a *per se* or a rule of reason analysis; and (3) the

restraint affected interstate commerce. *Law v. NCAA,* 134 F.3d 1010, 1016 (10th Cir. 1998).

Application

With respect to the first element, there is no dispute that the two in four rule was formed as the result of an agreement among NCAA members. Needless to say, the parties dispute the second and third elements, *i.e.,* whether the two in four rule constitutes an unreasonable restraint of trade affecting interstate commerce.

Approaches to determining whether there is an unreasonable restraint on trade

In *NCAA v. Board of Regents,* 468 U.S. 85 (1984), the Supreme Court discussed the various approaches used to determine whether an agreement is an unreasonable restraint of trade. In that case, two Universities which were members both of the NCAA and the College Football Association ["CFA"], challenged an NCAA plan which limited the total number of televised intercollegiate football games and the number of games that any one college could televise. The CFA had negotiated a contract with a television network which would have allowed a more liberal number of television appearances for each college and would have increased the CFA revenues. The NCAA notified the CFA that it would take disciplinary action against any members who did not comply with the NCAA plan. Two Universities then challenged the NCAA plan under § 1 of the Sherman Act.

Initially, the Supreme Court observed that the NCAA "is an association of schools which compete against each other to attract television revenues, not to mention fans and athletes." *Id.* at 99. Under the plan, however, the NCAA created "a

horizontal restraint -- an agreement among competitors on the way in which they will compete with one another. A restraint of this type has often been held to be unreasonable as a matter of law." *Id.* at 99. The Court explained that, "[b]y restraining the quantity of television rights available for sale, the challenged practices create a limitation on output" which has routinely been considered an unreasonable restraint of trade, *Id.* In addition, the NCAA plan operated to preclude any "price negotiation between broadcasters and institutions, thereby constituting horizontal price fixing, perhaps the paradigm of an unreasonable restraint of trade." *Id.*

The Court further observed that "[h]orizontal price fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal *per se*' approach because the probability that these practices are anticompetitive is so high" *Id.* at 100. Thus, the *per se* approach is applied "when 'the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.'" *Id.*, quoting *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979). Under this approach, an agreement to limit output or fix prices is unreasonable *per se* without inquiring into the particulars of the specific market. *Id.*

Despite the foregoing, the Supreme Court declined to apply the *per se* analysis to the restraint at issue in *Board of Regents* because of the fact that the industry is one "in which horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 101. The Court observed that the NCAA plays a vital role in enabling the particular product-- college football--to be marketed. By enacting roles such as those affecting the size of the field, the number of players on a team, and the nature of permissible physical contact, the NCAA preserves the integrity of the product.

Thus, according to the Supreme Court, competition is "enhanced, not diminished. *Id.* at 101-02. The Court concluded that, although the NCAA's plan at issue in *Board of Regents* restrained the ability of member institutions to compete in terms of price and output, in light of the NCAA's role, a *per se* approach was not warranted. Rather, the Court applied the rule of reason analysis in a "quick look" form. Under this approach, a restraint is "presumed unreasonable without inquiry into the particular market context in which it is found." *Id.* at 100.

As the Tenth Circuit later explained in *Law v. NCAA,* 134 F.3d 1010 (1998), under the full rule of reason analysis, the Plaintiff bears the initial burden of showing that an agreement has a substantially adverse effect on competition. If this burden is met, the Defendant then must show the procompetitive virtues of the agreement. Once this is shown, the Plaintiff then must show that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that the objectives can be achieved in a substantially less restrictive manner, *Id.* at 1019.

With regard to the Plaintiff's initial showing -- anticompetitive effect -- the Plaintiff may satisfy this burden by "indirectly proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects, such as control over output or price." *Law,* 134 F.3d at 1019. When the challenged agreement amounts to a horizontal limit on price or output, the "quick look" rule of reason analysis is used because in such a case "anticompetitive effect is established, even without a determination of the relevant market" *Id.* at 1020. Indeed, as the Supreme Court held in *Board of Regents,* "when there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to

demonstrate the anticompetitive character of such an agreement.'" *Board of Regents*, 468 U.S. at 109, quoting *National Society of Professional Engineers,* 435 U.S. 679, 692 (1987). Proof of market power is not required when the "very purpose and effect of a horizontal agreement is to fix prices so as to make them unresponsive to a competitive marketplace" *Law*, 134 F.3d at 1020.

"Quick Look" vs. Full Rule of Reason Analysis

In the case at bar, Plaintiffs urge the Court to apply the "quick look" rule of reason approach used by the Supreme Court in *Board of Regents* and by the Tenth Circuit in Law. The Defendant NCAA opposes this view and argues that a full rule of reason analysis must be used to determine the alleged anticompetitive effect of the two in four rule since, according to the NCAA, the rule does not involve price fixing or output restraints. Plaintiffs take issue with this approach and argue that the two in four rule does in fact amount to an output restraint because it limits the member institutions' ability to participate in certified events, which thereby eliminates the Plaintiffs -- promoters of the events -- as competitors. *(Plaintiffs' Post Trial Memorandum* at 1),

While the Court acknowledges that the rule at issue in this case is not a typical standard-setting regulation, such as those defining the length of season, the size of playing field, etc., the Court nonetheless concludes that application of the "quick look" rule of reason approach is not appropriate. Although Plaintiffs argue that the two in four rule results in a limitation on output, any such limitation is unlike the obvious horizontal restraints on output found in *Board of Regents and Law.* In this case, decreased output comes in the form of the Plaintiff promoters' alleged inability to secure participation of NCAA member institutions in certified events no more than twice in

every four years. According to Plaintiffs, because of the rule, "major" NCAA institutions cannot participate in the Plaintiffs' events on an annual basis, thereby making it more difficult for Plaintiffs to secure the appearance of other teams in their events, which arguably results in the events being less financially successful and will lead to a decrease in output in the third and fourth years of the rule's effect. There are, however, 25 exempt events and 319 teams in Division I. Thus, focusing on the total number of available teams, as opposed to only the "major" teams, would tend to negate Plaintiffs' argument of a potential decrease in output.

The decrease in output which Plaintiffs contend exists is not analogous to the restraint on output found in *Board of Regents* in which the NCAA plan, on its face, limited the number of games that could be televised and the number of televised games in which any team could participate. The two in four rule simply does not have the "obvious anti-competitive effects" as the rule at issue in *Board of Regents* so as to dispense with the full rule of reason analysis. Thus, the Court declines the employ the "quick look" approach and will consider whether the Plaintiffs have met the burden of showing whether the two in four rule has an anticompetitive effect under the full rule of reason analysis.

IV.

Evidence Offered to Demonstrate Alleged Anticompetitive Effect of Two in Four Rule

Expert Testimony

Plaintiffs have presented the expert testimony of Robert D. Tollison, a Professor of Economics at the University of

Mississippi.[5] Tollison concludes that the two in four rule has the anticompetitive effect of reducing output, a central issue in this case.

Before considering Tollison's opinions and their relevance to the instant action, the Court will resolve the pending motion of the NCAA to exclude Tollison's testimony under Fed. R. Evid. 702. The Court notes that Defendant's motion was filed prior to the commencement of the hearing. After establishing Tollison's credentials and ability to testify on the present issues, Plaintiffs tendered Tollison as a expert. The NCAA conceded at the hearing that Tollison is an expert. Nonetheless, the NCAA continues to challenge the foundational evidence upon which Tollison relied in forming his opinions.

Fed. R. Evid. 702 allows opinion testimony by experts when the witness is "qualified as an expert by knowledge, skill, experience, training or education" and "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1986), the Supreme Court set forth several factors to aid district courts in determining whether or not to admit an expert's testimony. As the Sixth Circuit has explained:

> The district court must determine whether the evidence 'both rests on a reliable foundation and is relevant to the task at hand.' In assessing relevance and reliability, the district court must examine

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[5] Tollison received his Ph.D. from the University of Virginia in 1969. Tollison has studied antitrust economics with a particular emphasis on the workings of the NCAA.

> 'whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.' This involves a preliminary inquiry as to whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue. Some of the factors that may be used in such an inquiry include: (1) whether the theory or technique has been tested and subjected to peer review and publication, (2) whether the potential rate of error is known, and (3) its general acceptance. This inquiry is a flexible one, with an overarching goal of assessing the 'scientific validity and thus the evidentiary relevance and reliability' of the principles and methodology underlying the proposed expert testimony. "A trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

Conwood Co., L.P.v.U.S. Tobacco Co., 290 F.3d 768, 792 (6th Cir. 2002) (internal citations omitted). Furthermore, "mere 'weaknesses in the factual basis of an expert witness' opinion...bear on the weight of the evidence rather than on its admissibility." *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 801 (6th Cir. 2000), quoting *United States v. I.E. Cooke Co.*, 991 F.2d 336, 342 (6th Cir.1993).

In this ease, the NCAA takes issue with Tollison's reliance on the availability of the "top 50" teams, as ranked according to the final 2001 College RPI rankings, as opposed to some other number of "top" teams. As the NCAA

acknowledges, Tollison's reliance on this number is based on Plaintiffs' assertion that they need "major" teams to assure the success and viability of their exempt tournaments. The Court concludes that this portion of Defendant's objection goes to the weight, rather than to the admissibility, of Tollison's testimony.

The NCAA also takes issue with the manner in which Tollison determined the number of teams left to play in years three and four of the two in four role. Tollison concluded that only 5 of the top 50 teams would be eligible to play; Defendant contends that, using Tollison's "top 50 teams," 22 would be available to play. At the hearing, during cross-examination, Tollison testified that, under his analysis, using Big 6 [6] conference teams, 22 teams would be left available to play in years three and four of the rule. Again, the Court concludes that Defendant's objection to Tollison's testimony bears on the weight to be given his testimony, not the admissibility. Thus, the Court finds no basis for excluding Tollison's testimony under Rule 702. The Defendant's prehearing motion is denied.

According to Tollison, because of the rule, there will not be a sufficient number of teams from the "major" conferences to make the Plaintiffs' certified tournaments viable for all four years. Tollison defined the "relevant market" for his analysis as NCAA Division I mens' basketball; the Defendant agrees with this definition. Tollison identified the competitors in this market as the NCAA, television promoters, schools, and the Plaintiff certified event promoters. According to Tollison,

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[6] The Big 6 consists of teams in the following conferences: the ACC, the Big 12, the Big East, the Big Ten, the Pac 10 and the SEC. *(Plaintiffs' Exhibit* 8).

because the two in four rule cuts in half the number of major teams, *i.e.*, Big 6 Conference teams, available to play in the Plaintiffs' certified events over a four year period, output will necessarily reduced by years three and four. Tollison opined that "major" school participation is necessary to attract fans, television, sponsors and other non-major teams who would otherwise not be able to play a major team on a neutral event site.

Tollision supported his opinion by identifying the remaining availability of Big 6 schools for play in certified events over the next two years, which are years three and four of the challenged rule. According to Tollison, the 68 schools within the Big 6 category initially have 136 slots available over the four years of the role, from 2000-04, to participate in certified events. In the first two years of the rule, *i.e.* the 2000-01 season and 2001-02 season, 92 available slots were used. This leaves 44 remaining slots. However, since at least 22 slots are already scheduled to be used in three prominent exempt events -- the Preseason NIT, the Maul Invitational and the Great Alaska Shootout -- only 22 slots remain to fill other certified events in years three and four of the rule. According to Tollision, this decrease will result in the elimination of many exempt events, which means a reduction in output.

Defendant NCAA takes issue with Tollison's opinion, arguing that his analysis confuses competitors with competition. As noted above, Defendant challenges Tollison's reliance on the Big 6 while ignoring teams from other major conferences, such as the Atlantic 10, Conference USA, Mountain West, and Western Athletic Conferences. Defendant also takes issue with Tollison's failure to consider the fact that the number of certified events Plaintiffs have promoted over the years has increased. In 1999, Plaintiffs promoted 9 events; in 2000, they promoted 10 events; in

2001, they promoted 12 events. According to the Defendant, this disproves Tollison's theory that the two in four rule will necessarily decrease output. Further, Defendant argues that by simply focusing on Plaintiffs' events, Tollison has ignored the effect of the two in four rule on the overall relevant market -- Division I mens' college basketball.

The NCAA has offered the testimony of two expert witnesses. The first, Louis A. Guth, received his Bachelor's degree in Economies from Harvard University and holds a Master's degree in Economies from the University of Pennsylvania. Guth is employed as the Senior Vice President of National Economic Research Associates, Inc., a firm of consulting economists.

In Guth's opinion, 98-92, including the two in four rule, has the effect of increasing, rather than decreasing the number of basketball games played in Division I mens' programs. Guth's opinion is based on the fact that the number of certified events has grown over the years to a total of 25 in 2000-01. Guth observes that with the addition of the 28th game to the playing season, there is an increase in output in the relevant market. Further, Guth observes that as the number of certified events has increased, the number of games has increased. While Guth recognizes Plaintiffs' argument that major team participation results in certified events being lucrative, Guth opines that 98-92 has the effect of "re-balancing" the amount of subsidy given to certified events. In Guth's view, as a matter of economics, certified tournaments are subsidized tournaments, with the NCAA being the source of the subsidy. Guth's opinion is that 98-92 will not prevent exempt tournaments from competing freely in the market with non-exempt tournaments and other games. Consequently, Guth views 98-92 as pro-competitive.

Defendant also offers the expert testimony of Jerry Hausman, Professor of Economics at the Massachusetts Institute of Technology.[7] Hausman received a Bachelor's degree from Brown University and a Ph.D. in Economics from Oxford University. Hausman has published over 120 research papers in leading economics journals and has particular knowledge with respect to antitrust issues. Hausman is currently an Advisory Editor for the Journal of Sports Economics.

Hausman takes issue with Tollison's characterization of the NCAA as a "cartel" and concludes that since the NCAA has the ability to limit the number of games which can be played in Division I mens basketball, the NCAA also has the ability to limit the number of exempt games which can be played. According to Hausman, 98-92 is pro-competitive because it increases the overall output of games in Division I. Hausman also views the two in four rule as pro-competitive because by limiting the number of exempt tournaments able to be played by a single team, the "special exemption" is distributed more evenly among all teams. Hausman opines that even if there is a decrease in the number of exempt tournaments, no anti-competitive effect would result because the overall number of games in Division I increases.

As Hausman points out, in 1998-1999, there were 4,695 Div. I games; in 1999-2000, there were 4,911 Div. I games;

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[7] The Court notes that Plaintiffs object to Hausman's testimony on the basis that it is cumulative. Whether to consider his testimony is within the Court's discretion. The Court finds it appropriate to consider the testimony despite the fact that it may, to a certain extent, be duplicative of Guth's testimony. Plaintiffs' objection is overruled.

and, in 2000-2001, there were 4,930 games played.[8] Hausman acknowledges that if some certified events cease to exist the number of games would decrease. This is particularly the case given that separate and apart from the two in four rule, there is currently a moratorium on the certification of new events by the NCAA. According to Hausman, however, the decrease would not equate with a "substantially adverse effect" on the relevant market.

Nonexpert Testimony

In focusing on the increase in number of games, Defendant relies on another aspect of Proposition 98-92 -- the addition of the 28th game to the playing season. Plaintiffs take issue with the reliance on this addition in evaluating the alleged adverse effect of the two in four rule. Plaintiffs simply focus on the two in four rule itself, without considering the addition of the 28th game.

The Court concludes that consideration of the twenty-eighth game is not appropriate in evaluating the purported anticompetitive effect of the two in four rule. While 98-92 may have included both the addition of the 28th game as well

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[8] The Court notes that the increase in the number of games is diametrically opposed to the intent of college presidents who supported enacting the two in four rule. Dr. Kirwan, formerly President of the Ohio State University and the current Chairman of the Board of Directors for NCAA Division I, testified about his concern over the proliferation of games played in Div. I mens college basketball. Dr. Kirwan noted that mens basketball has the lowest graduation rate of any collegiate mens sport. Dr. Kirwan supported 98-92 as a means of reducing the number of games, when in fact, the rule has operated to increase the number of games, given the addition of the 28th game per season.

as the two in four rule, the Plaintiffs challenge only the two in four rule. The packaging of both rule changes in a single proposal does not change the role of reason analysis. The addition of an extra game per season to all teams in the relevant market does not, by itself, eliminate the potential anti-competitive harm of the two in four rule, which affects only certified events.

Alternatively, Defendant also contends that the total number of games played in certified events has increased: In 2000-01, 192 games were played; in 2001-02, 231 games were played. Nonetheless, as the Plaintiffs aptly observe, the effect of the two in four rule is best considered in years three and four, which begins with the upcoming college basketball season. As Plaintiff Lee Frederick testified, he is unable to predict the effect of the rule in years three and four.

Plaintiffs present evidence of their current scheduling for the 2002-03 season to show the purported anticompetitive effect of the rule. The Court notes that these are, at best, estimates and are not a final determination of which teams will play in Plaintiffs' events. The current schedules are as follows:

Promoter	Event	Format	Commitments
Gazelle	Coaches v. Cancer	4 teams	Syracuse
Gazelle	BCA Invitational	8 teams	----
Gazelle	Guardians Classic	16 teams	Brown, New Hampshire, Mt. St. Marys
Gazelle	BCA Classic	4 teams	----

Promoter	Event	Format	Commitments
Sport Tours	New Orleans Knockout	8 teams	Tulane, Nicholls State, Maine Indiana State
Sport Tours	Hawaii Pac. U Shootout	8 teams	Hawaii Pac. U.
Sport Tours	San Juan Shootout	8 teams	UPR-Maya, Sacred Heart Duquesne, Troy St., Denver
Dorna	NABC Classic	4 teams	E. Wash., Wisconsin, N. Illiniois, Winthorp
Dorna	America's Youth Classic	4 teams	----
Dorna	CoSIDA Classic	4 teams	----
Worldwide	Las Vegas Tourn.	8 teams	----
Worldwide	Las Vegas Invit.	8 teams	----
Worldwide	Las Vegas Classic	8 teams	----

According to Plaintiffs, their inability to fill the tournaments with the requisite number of teams is a result of the operation of 98-92.

Defendant submits that there are other factors that effect the Plaintiffs' alleged inability to continue their events in

years three and four of the rule. The total number of games played in the certified events has increased as follows:

Year	Number of games in Certified Events	Number of Events
1999-2000	214	26
2000-2001	192	22
2001-2002	231	25

As the Defendants point out, the greater number of events and number of games impacts the ability of Plaintiffs to schedule teams to play. This argument would have greater force, under traditional notions of competition, if some events would fold and new events would be scheduled. Given the current moratorium on certification of new events, this cannot occur.

Defendant's expert, Dr. Guth, conceded that, in light of the moratorium, if certified events fold over the next two years, there will be a decrease in output in the relevant market. The question is, however, whether any such decrease mounts to a substantially adverse effect on competition. From the record before the Court, this question is impossible to answer without data concerning years 3 and 4.

From the vantage point of the Plaintiffs, tournaments require "major" teams for the events to be profitable. Further, by filling most of the available slots with schools in the first two years of the rule, slots in years three and four will, presumably, be harder to fill with other schools. The fact that the slots will be harder for Plaintiffs to fill does not necessarily lead to the conclusion of a substantially adverse effect on competition. Plaintiffs could conceivably sponsor events that do not draw as many "major" schools in years

three and four and then resume filling their events with "major" schools when the four year cycle starts again. While this result would no doubt impact on Plaintiffs' profits, such a loss does not necessarily equate with a decrease in competition in the market.

It is clear that the antitrust law protects competition, not competitors. *Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962). It is Defendant's contention that Plaintiffs cannot show the sort of injury that is protected by the antitrust law so as to warrant injunctive relief. In order to succeed on their claim under § 1, the Plaintiffs must show "antitrust injury" as opposed to mere "economic injury." *See Valley Prods. Co. v. Landmark,* 128 F.3d 398, 402 (6th Cir. 1997). Antitrust injury is "'injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.'" *Id.,* quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489 (1977). In considering whether this standard is met, the Court is to consider the "directness or indirectness of the asserted injury.'" *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 529 (1983).

Defendant contends that any injury Plaintiffs may suffer in years three and four is economic and is not attributable to the alleged adverse effect of the two in four rule on the market of certified events. In support of this argument, Defendant relies on, *inter alia,* the decision of the Sixth Circuit in *Hodges v. WSM, Inc.,* 26 F.3d 36 (6th Cir. 1994).

In *Hodges,* the Plaintiff operators of an airport shuttle and sightseeing service in Nashville, Tennessee sued the Defendants Grand Old Opry Tours, Opryland, USA and WSM, Inc., for allegedly violating § I of the Sherman Act.

The Defendants decided that they would operate their own sightseeing shuttle service. Any other service which wanted to transport passengers from the Defendants' hotel to the airport had to agree that it would refrain from running a sightseeing shuttle service. The Plaintiffs wanted to transport both sightseers and airport passengers. Consequently, the Defendants refused to authorize the Plaintiffs to enter upon their property and pick up airport passengers. Plaintiffs alleged that Defendants' agreement with the other operators excluded Plaintiffs from the marketplace. The district court concluded that Plaintiffs failed to show antitrust injury, and the Sixth Circuit agreed.

In reaching its decision, the Sixth Circuit reasoned that the injury "resulted from defendants' lawful refusal to grant plaintiffs access to their private property. . . . Their injury was not an 'antitrust injury' because it did not result from any decrease in competition among shuttle operators." *Hodges, 26* F.3d at 39. Further, the Court held that plaintiffs "did not allege, nor could they, that the illegal antitrust conduct was a necessary predicate to their injury or that defendants could exclude plaintiffs only by engaging in the antitrust violation." *Id.*

The requirement of antitrust conduct as a necessary predicate to Plaintiffs' injury was later applied in the case of *Valley Products Co. v. Landmark,* 128 F.3d 398 (6th Cir. 1997). In *Valley,* the Plaintiff, a manufacturer of soap and other hotel amenities, sued the Defendant Hospitality Franchise Systems, Inc., a franchiser of lodging facilities which held trademark and tradename fights for various large hotels. Plaintiff claimed that the Defendant's termination of its vendor agreement amounted to an antitrust violation. The Sixth Circuit held that Plaintiff failed to show sufficient antitrust injury because the Defendant was within its legal

rights to certify or not certify the Plaintiff vendor with the right to use logos in the manufacture of hotel amenities "even though that denial may have the unfortunate effect of excluding Plaintiffs from the HFS guest amenity market." *Id.* at 404. The Court concluded that injury to the Plaintiffs was not a result of decrease in competition in the marketplace but rather from the lawful termination of a contract.

In the case at bar, Defendant argues that application of the antitrust injury rule yields the same result; that is, that the purported harm to Plaintiff is not the result of decreased competition in the marketplace. Defendant contends that the Plaintiffs, as promoters of certified events, are simply non-competitive middlemen who "package or repackage the product that colleges provide using an NCAA-created subsidy." *(Defendant's Post-Hearing Brief at* 18). According to Defendant, the NCAA member institutions are "owners" and providers of the input in the games and Plaintiffs are simply middlemen who stand to make a profit.

In further support of this argument, Defendant cites *HyPoint Technology, Inc. v. Hewlett-Packard Co.*, 949 F.2d 874 (6th Cir. 1991). *Plaintiff in Hypoint Technology* was computer maintenance firm which sued the Defendant computer manufacturer for allegedly violating the antitrust laws by withdrawing its guarantee to customers that it would provide customer service response for computer repairs within four hours of a call for service. Prior to this action, Hypoint actually had the initial contact with the customers and Hypoint arranged for Hewlett-Packard repair personnel to perform service on the computers. Subsequently, Hewlett-Packard became aware of this arrangement and decided that its employees should not be used for this service of Hypoint. As a result, Hewlett-Packard modified its response to customer requests for service and agreed to provide a guaranteed four

hour response time only to customers who contracted with Hewlett-Packard and not with Hypoint. Plaintiff argued that this decision was made to exclude Plaintiff and other competitors from the marketplace.

The Sixth Circuit concluded that, although the Plaintiff was a competitor of the Defendant as to service contracts, it was a competitor "in a semantic sense, but not as a matter of economics" because not "every injury to a competitor is an antitrust violation." *Id.* at 877. The Court concluded that no injury to competition occurred as a result of the Defendant's decision to not apply the four hour guarantee in all circumstances. "It was in fact beneficial to competing service organizations" because the evidence showed that certain customers were angered and looked for other service providers, *Id.* Furthermore, the Court noted that, although the Plaintiff was injured as a result in the change in response time policy, the circumstance arose solely from the Plaintiff's vicarious use of the defendant's service business. The Court observed that nothing prevented the Plaintiff from continuing to offer the same kind of service in isolation after the Defendant made its decision. *Id.* at 879.

Defendant argues that Plaintiffs in this ease make the same unavailing argument, because as in *Hypoint,* the Plaintiffs herein are middlemen who simply want to "plug" themselves into college basketball and reap the profits. Defendant contends that Plaintiffs do not have the right under the antitrust law to a guaranteed input and profits. According to the Defendant, despite the two in four rule, certified events will continue and any decrease in the Plaintiffs' ability to supply tournament games involves no injury to competition and therefore does not implicate antitrust laws.

Defendant's argument rests on the premise that there in fact will be no decrease in output in years three and four as a result of the two in four rule. Yet, even Defendant's expert acknowledged that whether a decrease in output will occur is yet to be seen.

The holding in *HyPoint Technology* is of limited application in this case. While Plaintiffs in this case are clearly dependent on the ability to secure NCAA member institutions for their events, the Plaintiffs have no alternative source for business as did Plaintiff in *Hypoint*. Plaintiff in *Hypoint* could have, as the Court observed, continued on in the market in isolation by making its own guarantee for service repair and entering into independent contracts. Plaintiffs herein, however, cannot continue on in isolation if there are no schools available in years three and four of the two in four rule to participate in their events. It is undisputed that the two in four rule limits the ability of schools to play in certified events. Further, the NCAA's market power is significantly more pronounced than that of the Defendant in *Hypoint Technology*.

The Court cannot conclusively determine at this juncture whether Plaintiffs will be able to show injury of the sort that the antitrust law is designed to prevent. As stated *supra,* whether the two in four rule has a substantial adverse effect on the market requires consideration of whether there is decreased output as a result of 98-92. Prior to the 2002-03 and 2003-04 seasons, the Court cannot determine whether such diminution will occur, and whether, if it does, Plaintiffs will have suffered cognizable antitrust injury. The Court rejects Defendant's assertion that Plaintiffs' could never show the type of injury that the antitrust laws seek to prevent. Concomitantly, the Court cannot grant injunctive relief based on speculation as to the nature and extent of the purported

injury or to the extent that competition may be diminished in years three and four of the rule.

In order to succeed on a § 1 claim, the Plaintiff bears the initial burden of showing a substantial adverse effect on competition. If this burden is met, the Defendant then must show the procompetitivc virtues of the agreement. Once this is shown, the Plaintiff then must show that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or, that the objectives can be achieved in a substantially less restrictive manner.

In this case, it is premature to assess whether Plaintiffs have satisfied their initial burden. Consequently, the Court will not address whether Defendant has successfully shown the procompetitive virtues of the two in four role or whether the Plaintiffs can show that there are substantially less restrictive alternatives that could justify the virtues of the rule.

While the Court denies the Plaintiffs motion for preliminary injunction, the Court directs that the record remain open for further consideration as to the request for a permanent injunction to determine whether the two in four rule will have a substantially adverse effect on the output of certified event games in years 3 and 4, *i.e.*, seasons 2002-03 and 2003-04.[9]

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[9] This is not to be mistaken with any financial harm which the Plaintiffs may suffer from not being able to secure teams for their tournaments. As this Court has made clear, the antitrust law protects competition not competitors. If the Plaintiffs are unable to schedule teams and there is a reduction in output of certified events, then the Court will revisit the issue of whether the two in four rule has a substantially adverse effect on the relevant market. If, however, other certified events continue and there is no

In the absence of a showing of actual or clearly threatened antitrust based harm, a preliminary injunction may not issue. The record, as currently constituted, does not permit the Court to accurately assess the purported anticompetitive effects Of the two in four rule at this stage in the rule's life. The record will remain open as to Plaintiffs request for a permanent injunction; further proceedings will be scheduled to develop the record as to the effects of the rule on years three and four.

Section 2 of Sherman Act

Plaintiffs also seek preliminary and permanent injunctive relief under § 2 of the Sherman Act, which provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2.

Plaintiffs contend that the NCAA possesses monopoly power in the relevant market and that it has willfully acquired and will maintain this power by virtue of the two in four rule.

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decrease in output even though some of Plaintiffs" events fail, the Court finds it unlikely that a substantially adverse effect on the market could be found.

In order to succeed on this claim, the Plaintiff must show: "(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Such power includes the "power to control prices or exclude competition." *Id.* at 571.

As stated above, the Court cannot determine at this juncture, whether the two in four rule has excluded competition so as to advance a claim under § 2 of the Sherman Act. The Court leaves open Plaintiffs' request for relief under this section in the event that the Court later finds the two in four rule to adversely affect output on the relevant market. Thus, Plaintiffs' request for relief under § 2 is held in abeyance.

There are two remaining matters raised by Plaintiffs that warrant discussion: the alleged adverse intent of the NCAA in enacting the two in four rule and, the request that this Court draw adverse inferences on two evidentiary matters.

With respect to the first issue, in pursuing their claim for injunctive relief, Plaintiffs place great emphasis on the alleged adverse intent of the Defendant NCAA in enacting the two in four rule. While the NCAA, which is comprised of approximately 1,200 college, universities, and athletic conferences, sets rules related to all major college sports to foster the goal of promoting student-welfare, the NCAA also occupies a unique role with respect to the sport of mens college basketball. The NCAA is the owner of the well-known end of the season National Championship Tournament, which is played in the months of March and April each year. This tournament is known as one of the premier sporting events in

the country and is responsible for generating the predominant source of the NCAA's annual revenue.

The Plaintiffs argue that the legislative history of the two in four rule evidences an anticompetitive intent on the part of the NCAA to eliminate certified events and shift revenues to the NCAA and its member institutions. Plaintiffs contend that, beginning in 1995, the NCAA began to review the revenues received by outside promoters, such as Plaintiffs, to determine if such revenues could be derived by member institutions. According to Plaintiffs, onerous certification and travel reimbursement requirements were instituted as a means to eliminate such events. According to the testimony of Plaintiff Lee Frederick, a member of the Exempted Contests Subcommittee told him that the rule was intended to drive outside promoters out of business. The NCAA denies any such intent and asserts that the detailed certification and reimbursement requirements are simply an outgrowth of the NCAA's function as a standard-setter.

With respect to alleged adverse intent of the NCAA regarding the two in four rule, the Plaintiffs focus on the legislative history of the rule itself. The NCAA Constitution requires that proposed legislation have a stated "rationale." The stated purpose of Proposa1 98-92 initially was one of "concern" about the proliferation of exempt events and the belief that funds from the events should accrue more to institutions than to outside promoters.[10] This rationale was

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[10] In October 1998, the Die. I Championships/Competition Cabinet identified the rationale as follows:

> The cabinet continues to be concerned about the proliferation of exempted basketball events (both inside and outside of the continental United States),

presented in connection with the various NCAA subcommittees and committees but was removed from the final version of the rule due to "legal concerns." Prior to the passage of Proposal 98-92, the rationale was revised to reflect concerns over "competitive equity" among the many Division I institutions and their ability to compete in certified events.

> This proposal will address competitive equity concerns by giving many Division I institutions an opportunity to compete in certified events, particularly those outside the continental United States, so that the inherent recruiting and competitive advantages are distributed equally among Division I institutions. This proposal will provide Division I men's and women's basketball programs greater flexibility in the scheduling of basketball contests. It will permit institutions the opportunity to participate in certified contests in accordance with the legislation or to add additional contests to the institution's regular-season

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> particularly those that involve outside sponsors that appear to benefit at least financially more than the Division I institutions participating in such events. In addition, the cabinet believes that as many Division I institutions as possible should be given an opportunity to compete in exempted events, particularly those offshore, so that the inherent recruiting and competitive advantages are distributed equitably across schools. Allowing too many exempted basketball contests off the mainland, however, may lead to pressure from coaches in other sports to receive the same opportunities to travel outside the continental United States.

(Def. Exhibit 90).

> schedules during those years in which the institution either is not permitted to engage in a certified contest or chooses not to participate in such an event.

(Def. Exhibit 106).

Although negative inferences could be drawn from a review of the legislative history of Proposal 98-92, as the Defendant observes, there is other evidence to discount any negative animus on the part of the NCAA. John Parry, member of the NCAA Management Council and athletic director of Butler University, testified on deposition that the NCAA had no ill desire to harm Plaintiffs by enacting 98-92. Rather, the intent was to allow non-major schools a greater ability to participate in certified events. Dr. Kirwan testified that, for various university presidents, the purpose of the rule was to promote academics by reducing the numbe, of games played. This goal was clearly subverted by the addition of an extra game to permit a maximum of twenty eight countable games per year.

As with most policies adopted by large organizations, rules proposed by NCAA officials may be supported by others for various, often conflicting, motives. Clearly, with regard to 98-92, the motivation of university presidents was the promotion of student-athlete education. Coaches and Athletic Directors appear to have had a different motivation, which included increasing the number of overall games and spreading out the number of teams in exempt events. Given the lengthy process undergirding the passage of 98-92, it is not surprising that various actors in the proceedings may have had differing motivations in supporting the rule.

With respect to antitrust law, evidence of intent to harm a competitor does not necessarily comport with an antitrust

violation. "Mere allegations of business disparagement are not the type of injuries to competition that the antitrust laws were designed to prevent." *Re/Max International v. Realty One, Inc.*, 900 F.Supp. I32, 159 (1995). Furthermore, "[a]nimosity, even if rephrased as 'anticompetitive intent' is not illegal without anticompetitive effects." *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397, 400 (7th Cir. 1989).

This Court concludes that whether or not the two in four rule constitutes an antitrust violation depends upon the effect of the rule on output, not on the motives of some NCAA representatives. The purported bad intent of the NCAA is not necessarily relevant to the issue at this juncture in the action. The Court remains mindful, however that "good motives" as stated in the legislation, "will not validate an otherwise anticompetitive practice." *NCAA v. Board of Regents,* 468 U.S. 85, 101 n.23 (1984).

Plaintiffs also urge the Court to draw an adverse inference from the NCAA's failure to produce requested secretary's notes of NCAA committee and subcommittee meetings doffing with the legislative purposes for the two in four rule. The minutes to the meetings reference the existence of such notes. The NCAA concedes that certain hand-written secretary notes were discarded "well before this litigation commenced." *(Defendant's Post Hearing Brief at* 31). In addition, NCAA employees, Berst and Mallonee, who are familiar with the NCAA meeting practices, testified that the NCAA has no official policy with respect to the keeping of secretary notes.

The Court finds it inappropriate to draw an adverse inference from the failure of Defendant to produce certain of its secretary notes. There is no reason to discredit the testimony of Berst and Mallonee that the NCAA did not have

an official policy regarding the keeping of notes even though their existence may be referenced in committee minutes. Furthermore, even if an adverse inference were to be drawn, such inference would do little to advance Plaintiffs' claims at this point. As the Court has stated, it is the adverse effects of the two in four rule on output in the relevant market that will determine whether this Court finds an antitrust violation.

Similarly, the Court declines to draw an adverse inference from the Defendant's failure to call Richard Ensor as a witness at the hearing. According to Plaintiffs, Ensor, a former member of the NCAA, had earlier advocated the elimination of outside-sponsored mens basketball events. As the Defendant points out, however, Plaintiffs could have called Ensor as a witness. Thus, the Court declines to draw an negative inference from the Defendant's failure to call Ensor.

VI.

On June 25, 2002, Plaintiffs filed a motion for temporary relief to: (1) prevent the NCAA from denying certification to Plaintiff's events for lack of information that will be available following the Court's ruling; (2) prevent the NCAA from allegedly misinforming Division I schools that the rule will be in effect regardless of the Court's ruling; and (3) requiring the NCAA to send an agreed upon communication to all Division I schools accurately indicating that if the Court rules in Plaintiffs' favor, that the 2 in 4 rule cannot apply to the upcoming season.

The Court conferred with counsel on the above motion when it was filed, pursuant to S.D. Ohio Local Rule 65.1. It was agreed that the matter would be held in abeyance pending this Court's ruling on the merits of the request for permanent

injunctive relief. The Plaintiffs conceded that the motion would be moot following the Court's ruling.

In light of the Court's ruling on the Request for Permanent Injunctive Relief, the Plaintiffs' June 25, 2002 motion is denied as moot.

VII.

For the above stated reasons, the Court DENIES Plaintiffs' Motion for a Preliminary Injunction and HOLDS IN ABEYANCE a decision as to Plaintiffs' request for a Permanent Injunction pending further proceedings as to the effect of Rule 98-92 on the output of games in years three and four.

IT IS SO ORDERED

_____	/s/ Edmund A. Sargus, Jr.
DATE	EDMUND A. SARGAS, JR.
	UNITED STATES DISTRICT JUDGE

(3)

No. 04-1404

Supreme Court, U.S.
FILED
JUN 20 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

WORLDWIDE BASKETBALL AND SPORT TOURS, INC., *et al.*,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT REQUIRED BY RULE 29.6

The National Collegiate Athletic Association is a non-profit entity and does not issue stock.

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1992 Horizontal Merger Guidelines, Revised in 1997, available at *http://www.usdoj.gov/atr/public/guidelines/hmg.htm#11,* visited June 19, 2005 4

A writ of certiorari is not appropriate in this case. The Sixth Circuit's opinion is a straightforward and sound application of its own precedent, which is consistent with the precedent of this Court and that of the other Circuits. The Sixth Circuit applied the unassailable rule throughout the courts that in an antitrust case it is a plaintiff's duty to allege and prove a relevant market by substantial evidence. Failure to do so is fatal to an antitrust claim and properly caused the Sixth Circuit to reverse the District Court's erroneous entry of a permanent injunction against the National Collegiate Athletic Association ("NCAA").

The Petition's misstatements of fact and misapplication of law are merely an attempt to manufacture the appearance of a Circuit split — no such split exists. Likewise, there is no important issue of federal law that needs to be settled by this Court. The rules of law applied by the Sixth Circuit are well-settled and elementary to antitrust law. Thus, none of the prerequisites for granting a writ of certiorari as specified in Rule 10 of the Supreme Court Rules are met in this case.

STATEMENT OF THE CASE

Unfortunately, Petitioners' Statement of the Case attempts to mislead the Court as to the record to concoct a fictitious split among the Circuits. There is no error in the Sixth Circuit's decision, which merely applies well-established precedent to correct the trial court's errors on relevant market and the rule of reason. Stripped of Petitioners' distortions, it is plain that this case is not one that requires review by this Court.

In 2000, Petitioners, four sports event promoters who arrange a few college basketball events, filed a complaint

alleging that various NCAA rules regulating intercollegiate basketball violate the Sherman Act. The Complaint challenged rules adopted in 1999 revising how frequently teams are eligible (only twice in any four years, the "two-in-four" rule) to participate in special athletic contests, known as "certified events," which offer "free" games that do not count toward the season maximum limit.

Petitioners sought a preliminary injunction against the "two-in-four" rule.[1] The District Court converted the motion into a motion for permanent injunction, and held an evidentiary hearing. In its July 19, 2002 Opinion and Order, the District Court found that Petitioners had not shown harm to competition in what it found to be the relevant market, "men's Division I college basketball." The District Court held that a full rule of reason analysis was required for any antitrust examination of the two-in-four rule, and that the adverse effects of the two-in-four rule on output in the relevant market would determine whether this Court finds an antitrust violation. Appendix at 99a.[2] The District Court also ruled that it would hold the motion in abeyance to determine the impact of the rule over the remaining two years of its initial four year cycle. Appendix at 105a.

Before the cycle was complete, Petitioners renewed their motion for injunctive relief. The District Court again held a

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[1] The rule simply limits the frequency with which Division I teams may participate in "certified events" which are multiple-game tournaments. It permits teams to play in such events twice in any four-year period and makes participation count as one game even though multiple games are played.

[2] References herein to "Appendix __" are to the Appendix to the Petition.

hearing on a permanent injunction, and on July 28, 2003, entered an Opinion and Order finding that the two-in-four rule violated § 1 of the Sherman Act, and permanently enjoined the rule.

The 2003 Order rejected Petitioner's expert's opinion and his proposed "submarket" of pre and postseason tournament events. The District Court again found a relevant market of Division I men's basketball. However, contrary to those findings, the District Court incorrectly went on to find a relevant "submarket" for "school-scheduled" games, a "market" to which the parties had not agreed and which the evidence did not support. The District Court also erroneously claimed that it was applying a full "rule of reason" analysis while actually employing a cursory "quick look" analysis.

The Sixth Circuit stayed the 2003 Order pending appeal. Petitioners moved to vacate the stay, asking Justice Stevens, as Circuit Justice, to act. Justice Stevens denied the motion on August 26, 2003.

On November 15, 2004 the Sixth Circuit reversed after argument holding that the District Court erred in finding that Petitioners had met their burden of proving a relevant market and in adopting a market that was neither agreed to nor proven. Petitioners assert that the "parties, their experts and the court agreed that a relevant market for antitrust purposes is Division I men's college basketball." Petition at 3.[3] Petitioners fail to point out, however, that Division I men's college basketball was not the market that the District Court

[3] The parties did not agree or stipulate to *any* relevant market. Neither the District Court nor the Sixth Circuit found a substantial reduction in output in any broader market.

adopted for its antitrust analysis. Instead, the District Court erroneously adopted a so-called "submarket" within that relevant market that was explicitly rejected by the NCAA's expert and unsupported by Petitioners' evidence.[4] The Sixth Circuit correctly recognized this error and reversed.[5]

---

[4] For purposes of analyzing an antitrust claim there is only one relevant market in which the claims are to be analyzed. The Department of Justice and the Federal Trade Commission's Horizontal Merger Guidelines state: "A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy [the SSNIP] test." The SSNIP test refers to the process of defining a market such that "a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and nontransitory' increase in price [SSNIP], assuming the terms of sale of all other products are held constant." 1992 Horizontal Merger Guidelines, Revised in 1997 ("Merger Guidelines") § 1.0 available at *http://www.usdoj.gov/atr/public/guidelines/hmg.htm#11*, visited June 19, 2005. The merger Guidelines do not refer to submarkets at all. *See also,* 2A Phillip K. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 533(c) at 201 (2d Ed. 2001) ("Speaking of submarkets is both superfluous and confusing in an antitrust case, where the courts correctly search for a 'relevant market' — that is, a market relevant to the particular legal issue being litigated.").

[5] Petitioners' statement that "a divided panel of the Sixth Circuit reversed" is misleading. Petition at 4. Judge Gibbons' concurring opinion did not disagree with the majority that petitioners had failed to prove a relevant market or that the District Court had erred in adopting a submarket without proof. Rather, Judge Gibbons wrote that petitioners' "failure to establish that they have suffered an antitrust injury," precluded the need for further analysis because in her view, lack of antitrust injury, hence antitrust standing, make it "unnecessary to consider whether the plaintiff promoters [had] met their burden of proving that a relevant market exists . . ." *Worldwide*

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REASONS FOR DENYING THE PETITION

A. The Sixth Circuit's Opinion is Consistent with This Court's Precedent and the Law of all Other Circuits with Respect to the Framework of Proof of Anticompetitive Effects.

Petitioners first assert that the Court should review this case to eliminate a long-standing rule that antitrust analysis must begin with the definition of the relevant product market. Apart from its inconsistency with long-standing precedent, petitioners' argument rests on a fundamental misunderstanding of the Sixth Circuit's decision and a conflation of the antitrust analytic tools of market definition and market power.

1. The Sixth Circuit was Correct in Finding that this Case was Best Suited for Full Rule of Reason Analysis and that Such Analysis was not Properly Applied by the District Court.

Petitioners argued for adjudication of the two-in-four rule under the quick look standard in the District Court. That Court, however, ostensibly rejected quick look analysis in favor of the full rule of reason in finding that the challenged rule "simply does not have the 'obvious anticompetitive effects' . . . so as to dispense with the full rule of reason analysis." Appendix at 81a. The District Court acknowledged

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Basketball & Sports Tours, Inc. v. NCAA, 388 F.3d 955, 964 (6th Cir. 2004), Appendix at 18a, 19a. Judge Gibbons noted that in the market for college basketball games petitioners had failed to prove antitrust injury. 388 F.3d at 966, Appendix at 20a.

that this case required full rule of reason analysis because the two-in-four rule's effects were far from obvious and involved an industry "in which horizontal restraints on competition are essential if the product is to be available at all." *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984) (quoted in District Ct. Opinion, Appendix at 78a).

Petitioners now disingenuously attempt to confuse full rule of reason and quick look analysis in order to concoct an issue for this Court to address upon certiorari. This Court recently clarified "quick look" analysis in *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), and no further clarification is needed. Petitioners argue that precise market definition can be dispensed with in rule of reason cases, as in quick look cases, when anticompetitive effects are proven. *California Dental* reveals the fallacy of this argument. In *California Dental*, this Court explained that an "enquiry meet for the case" is required, which "look[s] to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the *market* has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction" can be made with a quick look. 526 U.S. at 781 (emphasis added).

California Dental further explained:

> In each of these cases, which have formed the basis for what has come to be called abbreviated or "quick look" analysis under the rule of reason, an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on ***customers and markets***

526 U.S. at 770 (emphasis added) (citing *Bd. of Regents*, 468 U.S. 85 (1984) and *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986)). In each of the two cases which *California Dental* cites for the genesis of quick look analysis there was some (albeit less than precise) delineation of the market in which the Court found that the challenged restraint would obviously produce anticompetitive effects. In *Bd. of Regents* the District Court had found a relevant market of live college football games on television, 468 U.S. at 94, and this Court held that the District Court had correctly found that price and output had been affected in this market. *Id.* at 104-05. In *Federation of Dentists* this Court held that "in light of the reality that markets for dental services tend to be relatively localized," 476 U.S. at 460, it was sufficient for the government to identify the approximate geographic area in which competition was adversely affected, namely "two localities in the State of Indiana (the Anderson and Lafayette areas), [where] Federation dentists constituted heavy majorities of the practicing dentists," and therefore no further precise definition of the market was necessary. *Id.* at 461. This Court did not dispense with market definition in cases where the product market is unclear and disputed.[6]

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[6] In this respect petitioners' reliance on *Toys "R" Us Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000) is confusing and unavailing. The Seventh Circuit explained the two ways of measuring market *power* clearly: "One is through direct evidence of anticompetitive effects. The other, more conventional way, is by proving relevant product and geographic markets and by showing that the defendant's share exceeds whatever threshold is important for the practice in the case." 221 F.3d at 937 (internal quotation omitted). The Seventh Circuit did not state that market definition is unnecessary in a rule of reason case. The Seventh Circuit later elaborated on its *Toys "R" Us* opinion in *Republic Tobacco Co. v. North Atlantic Trading Co.*, 381 F.3d 717 (7th Cir. 2004). In *Republic Tobacco* the relevant geographic

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The Sixth Circuit correctly followed this Court's teaching in finding rule of reason analysis appropriate because

> [f]ar from being a case in which "an observer with even a rudimentary understanding of economics could have concluded that the arrangements in question would have an anticompetitive effect on *customers and markets*," here the relevant market is not readily apparent . . . making it impossible to assess the effect of [the rule] on customers rather than merely on competitors.

Worldwide Basketball, 388 F.3d at 961, Appendix at 12a, (quoting *California Dental*, 526 U.S. at 770) (emphasis in Sixth Circuit's opinion).

The Sixth Circuit's reasoning is entirely consistent with *California Dental* and established authority. In industries like intercollegiate sports that require some horizontal cooperation in order to produce the core products, this Court and Circuit Courts have found that challenged restraints must be evaluated under the full rule of reason. *See, e.g., Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979); *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504 (9th Cir. 1989); *Brookins v. International Motor Contest Ass'n*, 219 F.3d 849 (8th Cir. 2000); *Smith v. NCAA*,

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(Cont'd)

market was disputed and the Seventh Circuit explained that '*Toys 'R' Us* and *Indiana Federation of Dentists* do not excuse North Atlantic from providing evidentiary support for its putative Southeast geographic market. Economic analysis is virtually meaningless if it is entirely unmoored from at least a rough definition of a product and geographic market." 381 F.3d at 737.

139 F.3d 180, 185 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999). There is no Circuit split on this issue.[7]

Nor is there a Circuit split as to how a full rule of reason analysis is to be applied. This Court has noted that "in the absence of *per se* liability, [plaintiff] has the burden of proving that [defendant] violated the Sherman Act because it unreasonably restrained competition. That burden necessarily involves an inquiry into the actual effect of the [challenged restraint] on competition" in a defined relevant market. *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 30 (1984). The Sixth Circuit held here that when a district court purports to apply a full rule of reason analysis, the district court must require plaintiff to prove the relevant market in which the challenged restraint is to be analyzed,

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[7] Petitioners' other citations are equally misleading. *Todd v. Exxon Corp.*, 275 F. 3d 191 (2d Cir. 2001) is the only § 1 case cited by petitioners involving rule of reason analysis. *Pepsico, Inc. v. Coca-Cola Co.*, 315 F.3d 101 (2d Cir. 2002) and *Great W. Directories v. Southwestern Bell Tel. Co.*, 63 F.3d 1378 (5th Cir. 1995) are both § 2 monopoly cases that do not involve rule of reason analysis. Furthermore, the Second Circuit in *Pepsico* noted that without evidence of direct adverse effects "market power necessarily must be determined by reference to the 'area of effective competition' — which in turn, is determined by reference to a specific, defined 'product market.'" 315 F.3d at 108 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962)). Similarly, the Fifth Circuit in *Great W. Directories* noted that "the purpose of the market definition and market power inquiry is to determine whether an arrangement has the potential for genuine adverse affects [sic] on competition. Proof of actual detrimental effects can obviate the need for the inquiry into market power." 63 F.3d at 1384. The Fifth Circuit did not state that actual adverse effects obviate the need for market definition because it would be meaningless to find a monopoly without a definition of the market in which that monopoly exists.

especially when the product market is "neither obvious nor undisputed." *Worldwide Basketball*, 388 F.3d at 961, Appendix at 12a. This is a correct and consistent application of the law.

Although the District Court had unequivocally concluded in 2002 "that application of the 'quick look' rule of reason approach is not appropriate" to the two-in-four rule (Appendix at 80a) and that under the rule of reason it "must first define the relevant product market" (Appendix at 53a), its decision ultimately went on to disregard this burden. The District Court correctly rejected the proposed "submarket" of pre and postseason basketball tournaments offered by petitioners' expert because he had not founded his opinion on sound methodology. Appendix at 44a. However, the District Court instead erroneously purported to find a "submarket" for school-scheduled games based solely on the testimony of the NCAA's expert, who unequivocally testified to the contrary.[8]

Upon review of the record, the Sixth Circuit consequently reversed, finding that "the relevant market is not readily apparent and the Plaintiffs have failed to adequately define a relevant market, thereby making it impossible to assess the effect of [the rule] on customers rather than merely on competitors." *Worldwide Basketball*, 388 F.3d at 961, Appendix at 12a. The Sixth Circuit's requirement that plaintiff prove a relevant market for rule of reason analysis is wholly consistent with this Court's decisions, Sixth Circuit case law and cases from other Circuits. *See, e.g., Gough v. Rossmoor Corp.*, 585 F.2d 381, 389 (9th Cir. 1978),

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[8] The District Court's mistakes as to the evidence of the relevant market are discussed in Part B of this brief.

cert. denied, 440 U.S. 936 (1979) (before courts can consider an antitrust claim, they "must know with what field of competition we are concerned and the dimensions of that field. Market definition is essential."); *Spectrum Sports v. McQuillan*, 506 U.S. 447, 455 (1993); *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers*, 325 F.3d 712, 720 (6th Cir. 2003); *Graphic Products Distrib. v. Itek Corp.*, 717 F.2d 1560, 1569 (11th Cir. 1983) ("In order to establish the defendant's market power, a plaintiff must first offer proof of a well defined relevant market upon which the challenged anticompetitive actions would have a substantial impact.") (internal quotation omitted).

2. There is no Circuit Split on the Requirement to Define a Relevant Market for Full Rule of Reason Analysis and Petitioners' Contention of a Circuit Split is Based Upon a Misapplication of the Law.

Petitioners' very formulation of the first question requiring resolution by this Court is fundamentally misleading, because they pose a question that in itself mischaracterizes what the Sixth Circuit did. Petitioners assert that the Court should review to address the question: "may plaintiffs use proof of significant anticompetitive effects as proof of market power in any antitrust case, or is such proof limited to 'quick look' rule of reason cases?" Petition at 5. This is not the question addressed by the Sixth Circuit. Rather, the Sixth Circuit held that when a District Court purports to use full rule of reason analysis, plaintiffs must meet their burden of defining a relevant market in which the alleged anticompetitive effects are to be analyzed. If a plaintiff shows only an incidental effect on competitors, its burden is not discharged by labeling these effects as "actual anticompetitive effects" without any reference to market

alternatives or consumer choice. *Worldwide Basketball*, 388 F.3d at 961, Appendix at 12a.

Petitioners attempt to manufacture a Circuit split on the role of market power in rule of reason analysis. In fact, there is no Circuit split on the well established requirement for proof of the relevant market in a rule of reason analysis. Petitioners argue that the Sixth Circuit's opinion is in conflict with the Second Circuit, claiming that *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001) held that a showing of market power obviated the need for market definition. Petitioners' argument is a *non-sequitur*. Market power is meaningless without a definition of the market in which that power is being exerted, and the Second Circuit did not hold otherwise. The Second Circuit's opinion in *Todd* addressed defendants' motion for judgment on the pleadings. The Second Circuit explicitly held that plaintiff had carried her burden of alleging a plausible relevant market and that plaintiff continued to bear the burden of proving this market at trial. 275 F.3d at 203-04.

Only after holding that plaintiff continued to bear the burden of proving the alleged market at trial, did the Second Circuit discuss market power. Petitioners conflate market power with market definition. Contrary to Petitioners' contention, the Second Circuit never suggested that plaintiffs in a rule of reason case do not need to prove the relevant market in which a defendant's market power is to be assessed. The petitioner's use of ellipses in their quote from *Todd* is misleading. The *Todd* court merely noted that after a market is defined, there is no requirement of "showing of market share [as] a prerequisite for bringing a § 1 claim," 275 F.3d at 207, because market share is only an indirect way of showing market power, which may also be shown by actual

anticompetitive effects. The Second Circuit noted that dispensing with a showing of market power where actual anticompetitive effects are proven is not limited to quick look cases, but it did not state, and it does not follow, that market *definition* may be dispensed with in a rule of reason case. 275 F.3d at 207.[9] The Sixth Circuit's opinion is in harmony with the Second Circuit: "Under the 'quick-look' approach, extensive market and cross-elasticity analysis is not necessarily required, but where as here, the precise product

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[9] The cases cited in *Todd* reinforce that plaintiff carries the burden of defining a relevant market in a rule of reason case. In *KMB Warehouse Distributors, Inc. v. Walker Mfg. Co.*, 61 F.3d 123 (2d Cir. 1995), the Second Circuit found that there existed an "aftermarket for automotive exhaust products" in which KMB had failed to show adverse effects or market power by Walker. 61 F.3d at 129. In *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc.*, 996 F.2d 537 (2d Cir. 1993), the court accurately defined plaintiffs' burden as follows: "plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice." 996 F.2d at 543. The Court then explained that proof of market power is unnecessary if plaintiff proves actual adverse effects. *Id.* at 546. Notably, Capital had defined the relevant product market in this case as the market for radiological services, and the geographic market as the area lying within a 100 miles radius of Albany, New York, and defendants had accepted these market definitions. *Id.* at 547. Finally, the Third Circuit in *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993) held that "plaintiff bears an initial burden of showing that the alleged combination or agreement produced adverse, anti-competitive effects within the relevant product and geographic markets, and satisfy this burden by proving the existence of actual anticompetitive effects." Since proof of actual adverse effects in a relevant market is often difficult to make, courts substitute a showing of market power for adverse effects. 5 F.3d at 668. However, this does not remove a plaintiff's burden of proving a relevant market.

market is neither obvious nor undisputed, the failure to account for market alternatives and to analyze the dynamics of consumer choice simply will not suffice." *Worldwide Basketball*, 388 F. 3d at 961, Appendix at 12a. Petitioners attempt to escape their failure of proof by commingling concepts of market definition and market power.[10]

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[10] "The analysis of market power begins with the definition of the relevant market, which provides the context in which to evaluate the restraint's effect on competition." ABA ANTITRUST SECTION, MONOGRAPH NO. 23, THE RULE OF REASON 108 (1999). *See also* 2A Phillip K. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 531(a) at 187 (2d Ed. 2001)

> Market definition is the initial step in assessing market structure. . . . While the inferences to be drawn from market shares are limited, there may be no practical alternative when the data are insufficient to find the firm's elasticities of supply and demand or its residual demand curves. If known, these numbers would measure market power directly without any need for market definition. Because they seldom have such data, antitrust courts traditionally define a market and examine the firms' market shares.

Areeda and Hovenkamp also note that there are other ways of proving market power that do not rely heavily on market definition — excess returns, price discrimination, intellectual property, contracts, evidence of excluding rivals, direct evidence from demand curves. *Id.* at ¶¶ 516-521. However, none of these are applicable to the case before this Court where there was no evidence of increased prices, excluded rivals, or price discrimination.

B. Petitioners Misstate the Facts by Claiming there was An Agreement as to the Market the District Court Analyzed.

1. The Sixth Circuit Correctly Found that there was No Agreement or Stipulation with regard to a Relevant "Submarket," and it is Disingenuous for Petitioners to Claim it did.

Petitioners' expert, Dr. Tollison, proposed a "submarket" consisting of pre and postseason men's Division I basketball tournaments. However, Dr. Tollison did not perform any adequate study to measure substitutability. Appendix at 38a. The District Court correctly excluded Dr. Tollison's testimony on relevant market because he had offered "no basis from which to conclude that a submarket of pre-season and post-season tournaments is an appropriate definition ..." Appendix at 44a. However, the District Court then committed reversible error by *inferring* the existence of a different "submarket" of school-scheduled games based on its mischaracterization of testimony by defendant's expert, Mr. Guth, ignoring his explicit testimony denying that such a submarket of school-scheduled games was appropriate.

The District Court specifically said that it was relying on the NCAA's expert in finding a relevant "submarket" of school-sponsored games. Appendix at 47a. However, the NCAA's expert expressly *denied* there was such a relevant submarket.

> Q. There has been testimony here and a claim that you proposed a submarket of school-scheduled games? Do you agree with that?

> A. I don't agree with it . . . I indicated that the so-called school-scheduled games . . . represent a category of particularly close substitutes.

(Tr. 6/18/03 at 143-44, JA 1527-28).[11] In response to the District Court's own questions, Mr. Guth further testified:

> THE COURT: You know, I want to be clear on that. Is it your testimony that the relevant market definition is what exactly?
>
> THE WITNESS: The relevant market definition is clearly men's Division I college basketball.

(Tr. 6/19/03 at 47, JA 1623). He then went on to emphasize this point:

> Q. And if you look at Paragraph 18, it says, "As noted earlier, the most important product, for purposes of this litigation, should be defined as school-scheduled games."
>
> A. Yes.
>
> Q. Aren't you saying there that that's the relevant product market as otherwise you indicated in the heading?
>
> A. ***Neither in words nor in intent . . .***

(Tr. 6/19/03 at 49, JA 1625) (emphasis added). Notwithstanding Mr. Guth's clear testimony, the District

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[11] References herein to "JA __" are to the Parties' Joint Appendix filed with the Sixth Circuit in this case.

Court asserted that he testified there was a "submarket" of "school scheduled games." Appendix at 47a. The District Court was simply wrong as to Mr. Guth's testimony, and wrong in finding that a submarket for school scheduled games existed that could serve as a relevant market for antitrust analysis.

Thus, contrary to the core assertion of the Petition, there was no agreement or stipulation by the parties to the relevant market utilized by the District Court. The District Court simply misunderstood the testimony of defendant's expert. As the Sixth Circuit accurately explained:

> [T]he district court relied on what it found to be the opinion of the defendant's expert, Mr. Guth, that the relevant submarket is school scheduled games — an opinion with which the court said Dr. Tollison had agreed.
>
> * * *
>
> At trial, however, when he was pointedly asked by counsel whether by this he was saying that the relevant market is school-scheduled games, Guth responded: "Neither in words nor in intent." .. . Given this record, it would be difficult to conclude that Mr. Guth named school-scheduled games as the relevant submarket. Accordingly, we decline to relieve the Promoters of their burden based on such a dubious stipulation by the defendant's expert.

Worldwide Basketball, 388 F.3d at 963, Appendix at 16a-17a.

It is disingenuous for petitioners to suggest that the Sixth Circuit held that parties may not stipulate to a relevant market. That was not an issue in this case nor was it a part of the Sixth Circuit's decision. Rather, the Sixth Circuit correctly held that a District Court may not *assume* that parties agreed or stipulated to a relevant market when there is unrebutted testimony to the contrary. Nothing in that holding warrants review by this Court.

2. Given the Parties' Disagreement as to the Relevant Market, the Sixth Circuit Properly Imposed the Burden of Proof on Plaintiffs.

Having correctly concluded that the parties had not agreed to the relevant "submarket" adopted by the District Court, the Sixth Circuit reversed because petitioners failed to meet their burden of proving the existence of a relevant market. This Court and the other Circuits concur that the burden to prove a relevant market in a rule of reason case resides with the plaintiff. It is well established that plaintiff must define and prove the contours of the relevant market in which its allegations of anticompetitive harm are to be analyzed. *See Spectrum Sports*, 506 U.S. at 455; *Plymouth Whalers Hockey Club*, 325 F.3d at 719-20; *Queen City Pizza, Inc. v. Domino's Pizza*, 124 F.3d 430, 436 (3d Cir. 1997); *Tanaka v. NCAA*, 252 F.3d 1059, 1063 (9th Cir. 2001).[12]

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[12] A plaintiff must first define a relevant market in order to state a claim under the antitrust laws. Determining the relevant market enables the court to assess whether the defendant has monopoly power in that market, what the area of competition is, and whether the allegedly unlawful acts have anticompetitive effects in that market.

Cupp v. Alberto-Culver USA, Inc., 310 F. Supp. 2d 963, 969 (W.D. Tenn. 2004) (internal citations omitted).

The Sixth Circuit's sound application of such a well-established rule belies petitioners' mischaracterization of the record below, and shows that this case is not one suitable for review by this Court.

CONCLUSION

The Sixth Circuit's opinion below is a straightforward and sound application of its own precedent, which is consistent with the precedent of this Court and that of the other Circuits. The Sixth Circuit applied the unassailable rule throughout the courts that it is a plaintiff's duty to allege and prove a definable antitrust market by substantial evidence. No sound basis exists for this Court to exercise its discretion to review this case. Accordingly, the Petition for writ of certiorari should be denied.

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In the Supreme Court of the United States

WORLDWIDE BASKETBALL AND SPORT TOURS, INC., et al.,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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I. INTRODUCTION

Respondent National Collegiate Athletic Association ("NCAA") fails to address the issues raised in the Petition.

The first issue raised in the Petition is that the Sixth Circuit erred and created a conflict by equating the use of anticompetitive effects to demonstrate market power with the "quick look" rule of reason. Petition at 5-7. This Sixth Circuit holding, which was the first articulated basis for reversal, is in direct conflict with decisions of the Second Circuit and of this Court. The latter decisions make clear that the use of anticompetitive effects to demonstrate market power may take place even in full rule of reason analysis. *Id.* The issue is not, as suggested by the NCAA, whether a quick look analysis should have been applied, or whether a relevant market must be defined. Brief in Opposition at 5-14. The NCAA's extensive analysis on these points is irrelevant.

The NCAA also fails to address the second issue: that the Sixth Circuit erred and created a conflict by ignoring a relevant market agreed to by the parties and their experts and adopted by the District Court - Division I men's college basketball. Petition at 7-9. The NCAA does not address this issue, but instead argues that the Sixth Circuit was correct in finding no agreement or stipulation as to a relevant submarket of school-scheduled games. Brief in Opposition at 15-18. The NCAA ignores the question of how a case can be dismissed for failure to prove a relevant market when the parties, their experts and the court agreed upon a relevant market.

The bases for the Petition remain unchallenged, and demonstrate that this Court should grant certiorari.

II. ARGUMENT

A. The Sixth Circuit Decision Misapplies the "Quick Look" Rule of Reason, in Conflict with Decisions of this Court and the Second Circuit.

In its 2003 opinion, the District Court confirmed that it would apply a full rule of reason analysis, as opposed to a "quick look" analysis, to this case. Appendix at 52a-53a. The opinion first analyzed the relevant market, holding that: "As to the relevant market, this Court concludes that it is Division I mens' college basketball. To the extent consideration of a submarket is appropriate, the Court finds that it is comprised of school-scheduled games." Appendix at 55a. After determining the relevant market, the District Court turned to the question of whether the NCAA demonstrated an adverse effect on competition through use of market power in the relevant market. Appendix at 56a-62a. The District Court began this section by noting that, ordinarily, an adverse effect may be shown by providing evidence of the defendant's role in the market, *i.e.* its market share. Appendix at 56a. The District Court then stated that "if a Plaintiff can show 'that the restraint has actually produced significant anticompetitive effects, such as a reduction in output,' a formal market analysis is unnecessary." *Id.* (quoting *Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839, 847-48 (9th Cir. 1996), quoting *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991)).

As the structure of the District Court's opinion demonstrates, it suffered no confusion at all about the need to define a relevant market within which to determine market power. The District Court found a relevant market, and then and only then addressed whether the NCAA unlawfully

exercised market power within this relevant market. The District Court simply noted that, pursuant to long held precedent, the exercise of market power could be demonstrated through significant anticompetitive effects.

The Sixth Circuit's error, as previously discussed, was in equating the use of anticompetitive effects to demonstrate market power with the "quick look" rule of reason standard. Petition at 5-7. One is not synonymous with the other. As stated by the Second Circuit, "The use of anticompetitive effects to demonstrate market power, however, is not limited to 'quick look' or 'truncated' rule of reason cases."[1] *Todd v. Exxon Corp.*, 275 F.3d 191, 206-07 (2nd Cir. 2001). This is consistent with precedent of this Court. *See FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986).

The NCAA does not address this clear error and conflict. Instead, the NCAA argues that Petitioners seek to eliminate the "long-standing rule" that antitrust analysis begins with definition of a relevant market, and argues that the District Court disregarded its burden of defining a relevant market. Brief in Opposition at 5, 10. This argument is nowhere in the Petition nor is it in the District Court's 2003 Opinion. The District Court determined that the agreed upon relevant market of Division I men's college basketball was appropriate; then, and only then, did it turn to the issue of

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[1] Petitioners cited to other cases – involving Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act – to demonstrate that market power determinations through use of anticompetitive effects is not limited to rule of reason cases. Petition at 6. The NCAA suggests that these citations are "misleading" because they are not rule of reason analyses. Brief in Opposition at 9, n. 7. These cases were cited precisely *because* they are not rule of reason analyses.

market power. The District Court properly determined market power through anticompetitive effects *within the relevant market*.

The District Court found that the Two in Four Rule had two primary anticompetitive effects: 1) a reduction in the overall number of games; and 2) a consequent denial of consumer preference for popular Division I men's college basketball games. Petition at 45a, 59a-62a, citing *Chicago Professional Sports Limited Partnership et al. v. National Basketball Association*, 754 F. Supp. 1336, 1363-64 (N.D. Ill. 1991) (5 game restriction on superstation broadcasts "reduces the number of games available to viewers nationwide . . . ."). *See also NCAA v. Board of* Regents, 468 U.S. 85, 107 (1984) ("A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.") The use of these anticompetitive effects to demonstrate market power was consistent with a full rule of reason analysis.

B. The Sixth Circuit Ignores an Agreed Upon Relevant Market, in Conflict with other Circuits and this Court.

The NCAA does not dispute that the parties agreed upon a relevant market, *i.e.*, Division I men's college basketball; in fact, the NCAA concedes the point. Brief in Opposition at 16. Nor does the NCAA dispute that the primary basis for reversal by the Sixth Circuit was the alleged failure of Petitioners to prove *any* relevant market. Instead, the NCAA attempts to divert the issue to whether there was an agreement on a relevant submarket of school-scheduled games, an issue not raised in the Petition.

The parties and their experts agreed upon a relevant market of Division I men's college basketball. Petition at 7. The District Court adopted Division I men's college basketball as a relevant market. *Id.* Despite this agreed upon relevant market, the Sixth Circuit reversed without remand, holding that the District Court erred in its market definition and the record did not contain evidence to support a proper market definition. Appendix at 3a-4a. Judge Gibbons, in her concurring opinion, stated that in her view it was "unnecessary to consider whether the plaintiff promoters have met their burden of proving that a relevant market exists for Division I men's college basketball games," and later noted "[a]s both parties agree, the relevant market is the market for college basketball games." Appendix at 19a, 22a.

The NCAA fails to address the mass of decisions where courts have routinely adopted stipulated or agreed upon relevant markets without further proof. Petition at 8. The NCAA does not provide any authority that is contrary to the holding of the Second Circuit that an appellate court acts improperly if it reverses a stipulated or agreed upon relevant market. *Stanley Works v. FTC*, 469 F.2d 498, 506 (2nd Cir. 1972). The NCAA provides absolutely no basis for why this Court should allow the Sixth Circuit, contrary to every other circuit that has considered the issue, to ignore the relevant market agreed upon by the parties, their experts, and the District Court.

The NCAA, instead, attempts to divert the issue to whether there was an agreement on a relevant submarket of school-scheduled games. Even assuming there was no

agreement on a relevant submarket,[2] there was still the undisputed agreement as to a relevant market of Division I men's college basketball. The Sixth Circuit reversed for failure to prove *any* relevant market. The NCAA glosses over this point by asserting that the District Court focused its antitrust analysis entirely upon the submarket for school-scheduled games, not the broader market for Division I men's college basketball. Brief in Opposition at 3-4. This is untrue. For example, the District Court notes and agrees with the opinion of Petitioner's expert that the Two in Four Rule has had an anticompetitive effect whether viewed in the context of the overall market of Division I men's basketball or in the context of a submarket because the number of games has declined. Appendix at 45a. And the District Court focuses upon the anticompetitive effect resulting from a denial of consumer preference. Appendix at 59a-61a. This denial of consumer preference occurs both in the broader market as well as the asserted submarket. *Cf. NCAA v. Board of* Regents, 468 U.S. 85, 110 (1984) (citing with approval Solicitor General statement that " . . . in the market for television programming – no matter how broadly or narrowly that market is defined – the NCAA television restrictions have

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[2] It is true that the NCAA's expert attempted in the 2003 hearing to recant his prior testimony and assert that there was no relevant submarket for school-scheduled games. Brief in Opposition at 15-17. This was despite the fact that he had previously testified, had previously provided a written report, and had previously provided charts and analyses all asserting just such a submarket. *See* JA 1755 (deposition testimony); JA 1073-74 (expert report); JA 2032-2040, 2124 (charts). The District Court, in the best position to judge, found the attempt to recant lacked credibility, and adopted a relevant submarket of school-scheduled games. Appendix at 55a. The District Court chided the NCAA for its misrepresentation of this issue. *See* JA 0268-0271.

reduced output, subverted viewer choice, and distorted pricing.").

And even had the District Court gone on, after defining a relevant market for Division I men's college basketball, to pursue a rule of reason analysis using only a submarket of school-scheduled games, this would not be the basis for reversal without remand. This would at most be the basis for remand, with instructions to conduct the rule of reason analysis using the broader market. The Sixth Circuit's reversal without remand, based upon an alleged failure to provide evidence of *any* relevant market, highlights the fact that the Sixth Circuit simply ignored the agreed upon relevant market of Division I men's college basketball.

III. CONCLUSION

The reasons for granting certiorari remain unchallenged. The Sixth Circuit, contrary to the Second Circuit and the precedents of this Court, has erred in equating the use of anticompetitive effects to demonstrate market power with the "quick look" rule of reason approach. Perhaps of greater importance and potential ill effect, the Sixth Circuit has contravened settled precedent by ignoring an agreed upon relevant market. This has the potential for eliminating the tremendous benefit, in terms of both judicial economy and settled expectations, resulting from stipulations and agreements in any case involving contested facts.

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